

CONSTRUCTION INDUSTRY LABOR LAW AMENDMENTS
OF 1987

APRIL 12 (legislative day, APRIL 11), 1988.—Ordered to be printed

Mr. KENNEDY, from the Committee on Labor and Human Resources, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 492]

The Committee on Labor and Human Resources, to which was referred the bill (S. 492), to amend the National Labor Relations Act to increase the stability of collective bargaining in the building and construction industry, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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I. THE AMENDMENT

Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be referred to as the "Building and Construction Industry Labor Law Amendments of 1987".

SEC. 2. (a) Section 2(2) of the National Labor Relations Act (29 U.S.C. 152(2)) is amended by adding at the end thereof the following new sentence: "Any two or more business entities engaged primarily in the building and construction industry, performing work within the geographical area covered by a collective bargaining agreement to which any of the entities is a party, performing the type of work described in such agreement, and having, directly or indirectly—

"(1) substantial common ownership;

"(2) substantial common management; or

"(3) substantial common control;

shall be deemed a single employer: *Provided*, That the terms and provisions of a contractor-subcontractor relationship between any two or more business entities working at a construction site shall not be deemed to create a single employer or be considered as evidence of direct or indirect common management or control, within the meaning of this sentence".

(b) Section 8(d) of such Act (29 U.S.C. 158(d)) is amended by adding at the end thereof the following new sentence: "Whenever the collective bargaining involves employees of a business entity comprising part of a single employer in the building and construction industry, as defined in section 2(2) of this Act, the duty to bargain collectively, for the purposes of this section, shall include the duty to apply the terms of a collective bargaining agreement between such business entity and a labor organization to all other business entities comprising the single employer and performing the work described in the collective bargaining agreement within the geographical area covered by the agreement."

(c) Section 8(f) of such Act (29 U.S.C. 158(f)) is amended—

(1) by striking out the colon at the end of clause (4) and inserting in lieu thereof a period and the following: "An agreement lawfully made pursuant to this subsection shall impose the same obligations under this Act as an agreement made with a majority representative pursuant to section 9(a)"; and

(2) by inserting before the period at the end of such section the following new proviso; "*Provided further*, That any agreement lawfully made pursuant to this subsection may be repudiated only after the Board certifies the results of an election conducted pursuant to section 9(c), in which a majority of employees in an appropriate bargaining unit either selects a bargaining representative other than the labor organization with which such agreement was made or chooses not to be represented by a labor organization".

SEC. 3. (a) Except as provided in subsection (b), the amendments made by section 2 shall take effect upon the date of the enactment of this Act.

(b) The requirement imposed by the amendment made by section 2(b) shall take effect—

(1) one year after such date of enactment with respect to any building and construction project for which the contract was entered into by an employer before the date of the enactment of this Act; and

(2) on the date on which the contract is entered into with respect to any new building or construction project for which the contract is entered into by an employer on or after the date of the enactment of this Act.

II. PURPOSE AND SUMMARY

The Building and Construction Industry Labor Law Amendments of 1987 corrects the misinterpretation of the 1959 Amendments to the National Labor Relations Act by the National Labor Relations Board and the courts.

The bill ensures that employers in the construction industry abide by contractual commitments they have voluntarily entered with unions in that industry. It restricts the practice of double breasting, whereby an employer avoids contractual obligations with the union by utilizing a nonunion subsidiary to perform work subject to a collective bargaining agreement. It also prohibits employer

repudiation of valid prehire agreements or bargaining relationships while protecting the right of workers to decertify an unwanted union.

III. HISTORY OF S. 492

A. BACKGROUND

S. 2181, The Building and Construction Industry Labor Law Amendments of 1986, was introduced by Senator D'Amato, read twice and referred to the Committee on Labor and Human Resources on March 11, 1986. Senators Kennedy, Bradley and Weicker were original cosponsors. On March 17, 1986 Chairman Hatch referred the bill to the Labor Subcommittee and requested executive comment from the Department of Labor and the Office of Management and Budget.

S. 2181 saw no further Senate action in the 99th Congress. Senators D'Amato, Kennedy, Weicker, Bradley, Metzenbaum, Sarbanes, Rockefeller, Riegle, Specter, Matsunaga, Hart, Lautenberg, Levin, Harkin, Mathias, Proxmire, Kerry, Pell, Inouye, and Dodd were cosponsors of the bill.

The Subcommittee on Labor-Management Relations of the House of Representatives Education and Labor Committee held its first public hearings to consider developments in labor law in the building trades on March 8, 1983 in Washington, D.C. Chairman of the subcommittee, Congressman William Clay, continued the oversight of labor law in the construction industry with a field hearing on September 12, 1983 in Seattle, Washington. On July 31, 1984 Congressman Clay introduced H.R. 6043, the Construction Industry Labor Law Amendments of 1984. H.R. 6043 received no legislative consideration during the remainder of the 98th Congress.

On January 3, 1985 Congressman Clay reintroduced the Construction Industry Labor Law Amendments, H.R. 281. The stated purpose of the amendments was to restore Congress' original intent for Section 8(f) of the National Labor Relations Act and increase the stability of collective bargaining in the building and construction industry. On May 21, 1985, the Subcommittee on Labor-Management Relations held a public hearing on the bill. On June 26, 1985 the Subcommittee voted out H.R. 281, as introduced, to be considered by the Education and Labor Committee.

The full Committee on Labor and Education by voice vote ordered H.R. 281 favorably reported, without amendment, to the House of Representatives on July 23, 1985. The Committee submitted a report together with dissenting views on October 17, 1985. On April 17, 1986 the House of Representatives passed the bill by a vote of 229-173. Because the Senate failed to act on S. 2181, this was the final action on the Construction Industry Labor Law Amendments in the 99th Congress.

At the outset of the 100th Congress, on January 6, 1987 Congressman Clay reintroduced the Construction Industry Labor Law Amendments, which was again designated H.R. 281. The bill contained provisions that were identical to the bill that had passed the House in the previous Congress and the language was identical to the language in S. 492. The Subcommittee on Labor-Management Relations held another hearing on H.R. 281 on March 4, 1987. On

March 31, 1987 the Subcommittee adopted an amendment in the nature of a substitute offered by Chairman Clay to further clarify the original bill. On the same day the Subcommittee voted the bill out to be considered by the full committee. On April 22, 1987 the bill received unfavorable comment from the Department of Labor.

The Committee on Education and Labor by voice vote ordered H.R. 281 favorably reported, without amendment, to the House of Representatives on May 19, 1987. The Committee submitted its Report together with Dissenting Views and Supplemental Dissenting Views on the amended "Building and Construction Industry Labor Law Amendments of 1987" to the House of Representatives on June 8, 1987. On June 17, 1987, the House passed H.R. 281, as amended, by a vote of 227-197.

The bill was received by the Senate on June 19, 1987 and read the first time. On June 23, 1987 the bill was read a second time in the Senate and placed on the Senate Legislative Calendar under General Orders.

B. THE SENATE BILL

S. 492, The Building and Construction Industry Labor Law Amendments of 1987, was introduced by Senators Kennedy, D'Amato, Bradley, and Weicker on February 5, 1987. The bill was read twice to the Senate and referred to the Committee on Labor and Human Resources. On February 11, 1987 the bill was referred to the Labor Subcommittee by Chairman Kennedy. On the same day a request for Executive Comment from the Labor Department was filed by the Chairman.

On June 4, 1987 the Labor Subcommittee, chaired by Senator Metzenbaum, held public hearings on the bill. The subcommittee approved the bill for full committee consideration without amendment on July 23, 1987. The subcommittee favorably voice voted the bill out.

The bill was ordered to be reported with an amendment in the nature of a substitute to the Senate by a 10-6 favorable vote of the full Labor and Human Resources Committee on December 9, 1987.

IV. LEGISLATIVE HISTORY

In the wake of the Great Depression and the New Deal, Congress enacted the National Labor Relations Act in 1935 under the leadership and guidance of Senator Robert Wagner. The prime function of the Act was to secure a meaningful and enforceable right of employees to organize and to bargain collectively with their employer. To enforce this new labor law, the Wagner Act established the National Labor Relations Board to have primary jurisdiction in regulating labor disputes. The Supreme Court has interpreted the Act to reflect a general congressional intent to have the NLRB produce a body of uniform federal law to govern labor-management relationships affecting interstate commerce.

Although no specific exemption for the construction industry was included in the Wagner Act, the NLRB generally refused to assert jurisdiction in cases involving the construction and building trades. That refusal was based on the fact that this industry both present-

ed unique issues of labor relations and was already substantially organized.

With the passage of the Taft-Hartley Amendments in 1947, the Board began to assert jurisdiction in construction industry cases with increasing frequency. In the 1948 case *Matter of Brown & Root, Inc.*, 77 NLRB 1136, the Board noted that its previous restraint in the construction industry was "a matter of administrative choice and not of legal necessity," and that it would not hesitate to intervene when interruption of construction projects would threaten interstate commerce. However, the traditional concepts used by the Board under the NLRA were not always readily applicable to the special characteristics of the construction industry's labor relations practices.

Prior to the late 1940's the common practice was for building and construction employers to enter into collective bargaining agreements with unions before any employees were hired, for periods of time running well into the future. Employers found these agreements necessary so they could accurately predict their labor costs in bidding on jobs and rely upon a steady supply of skilled labor if they won the bid. Because many of the projects were of such short duration, the agreements often applied to jobs which had not begun and employees who had not been hired. These "prehire" agreements were illegal under the Taft-Hartley Amendments. Under Taft-Hartley, although such cases were rarely brought, contractors who signed union contracts before employees were hired technically would be considered in violation of Section 8(a)(3), and the unions would be considered in violation of Section 8(b)(2).

The attempt to bring the customary hiring practices of the construction industry into conformity with the Taft-Hartley Amendments proved enormously difficult. In the years immediately succeeding passage of the Act, cases litigated by the Board generated grave concern among organized construction industry employers and construction industry unions over whether their established collective bargaining pattern would survive this shift in Board law. In 1949 the construction employer representatives on the Joint Board for the Settlement of Jurisdictional Disputes—a labor-management group formed to adjudicate work assignment disputes—submitted a petition to the NLRB for the stated purpose of:

Acquainting the Board with: (1) The peculiar employment practices which are necessary in the construction industry; and (2) the urgent need of establishing an understanding of the Labor Management Relations Act, in its application to the construction industry which will not completely destroy the conditions and purposes of employer-employee relationships which the Act declares is its purpose to encourage.

In that petition, the employer representatives (from the Associated General Contractors and the National Electrical Contractors Association) warned that "there are now developing and in the process of adjudication a number of cases which indicate some theories which would endanger the entire structure of collective bargaining and employer-employee relationships in the construction industry." The petition went on to explain the "construction industry procedures"—that the parties "carry on negotiations, (a) before work is commenced when the employer may have no employees; (b) on an

area basis with all potential employees and employers of men from the relevant labor pool; and (c) for an agreement for a given period of time (not generally job by job)."

The employer's petition argued that this procedure was the only way "the mandate of the Act could be carried out in the construction industry." without it, they argued the employers in the industry would be denied the "rights, privileges and protections which were available to employers in other industries."

The petition fell on more or less deaf ears at the Labor Board. In several cases decided in 1950-51, the Board found construction employers to have acted unlawfully in extending exclusive recognition to a union via a pre-hire agreement. The Board reasoned in these cases that arguments concerning "the general custom and practice in the construction industry" and the needs of that industry "should properly be addressed to Congress and not to the Board" as it was the Board's "duty as administrators to enforce the law as written and not to pass upon the wisdom or practicality of its provisions." *Daniel Hamm Drayage Company, Inc.*, 84 NLRB 458 (1949).

A. CONGRESSIONAL DEBATE DURING THE 1950'S

In response to this line of Board cases, members of Congress were quick to see the inequities of the labor law's application to the construction industry. In 1951 Senators Taft and Humphrey introduced and later reported out of the Senate Labor Committee a bill which provided that pre-hire agreements in the construction industry would not be in violation of the labor law. This bill passed the Senate without debate by a voice vote but was not acted upon by the House of Representatives before the 82nd Congress adjourned. 98 Cong. Rec. 5028-29 (1952).

In the 83rd Congress, Taft introduced a new bill similar to his bill from the previous Congress and President Eisenhower sent a message to Congress including a pre-hire legislative proposal. The Administration's proposal was embraced and promoted by Senator Smith, then Chairman of the Senate Labor Committee. The Smith bill was reported out of Committee but died on the floor when opponents prevailed on a motion to recommit the bill to Committee. See 100 Cong. Rec. 5827, 6193. With that vote the 83rd Congress' consideration of amendments to the NLRA effectively came to a close.

During this period the Board continued to adjudicate claims against construction employers and unions for engaging in pre-hire activity. In a major case, *Plumbers Local 231 (Brown-Olds)*, 115 NLRB 594 (1956), the Board caused a furor because of the severe penalties it imposed, and the General Counsel subsequently suspended its enforcement. (The Supreme Court eventually overruled the Board decision). Then in 1957, the Board upheld the legality of some hiring hall provisions, but only if certain language and restrictions imposed by the Board were contained in the provisions. *NLRB v. Mountain Pacific Chapter of the Assoc. General Contractors*, 119 NLRB 883. The Board's attempts to dictate hiring practices in the construction industry were rejected by the Supreme Court in *Local 357, Teamsters v. NLRB*, 365 U.S. 667 (1961). Despite

the Supreme Court's actions, these efforts by the Board intensified the push by contractors and unions for Congress to amend the Taft-Hartley Amendments to reflect more realistically the nature and needs of the building and construction industry.

Amending the NLRA received new attention in the 85th Congress. President Eisenhower again sent a message to Congress containing his proposal, which was again taken up by Senator Smith, now ranking minority member of the Senate Labor Committee. Senator John F. Kennedy, who was now Chairman of the Labor Subcommittee, introduced his own bill to make pre-hire agreements in the construction industry legal. The Senate Subcommittee on Labor held extensive hearings in 1958 on the various bills that were introduced. At the conclusion of those exhaustive hearings the Senate Labor and Public Welfare Committee reported out S. 3974, which became known as the Kennedy-Ives bill.

The main difference between this bill and the Administration proposal was that the Kennedy-Ives bill allowed building contractors to grant exclusive recognition to a union in a pre-hire contract without NLRB authorization, while the Eisenhower/Smith bill required the Board to certify the pre-hire agreement in every instance. This difference is crucial to the need for S. 492 today. Ultimately, it was the Kennedy-Ives (later Kennedy-Ervin) proposal, and not the Administration proposal, that was enacted as part of the Labor Management Reporting and Disclosure Act of 1959.

B. LABOR-MANAGEMENT DISCLOSURE AND REPORTING ACT OF 1959

It was not until the 86th Congress that both Houses of Congress were able to act at the same time. Once again the Kennedy proposal withstood amendments and motions to strike at the Committee level and on the Senate floor. This bill allowed employers and unions to enter into pre-hire agreements in the construction industry without Board intervention. Drawing on eight years of study of the subject, the Senate Labor Committee justified the provision as follows:

The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprises. . . . In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. . . . One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have an available supply of skilled craftsmen ready for quick referral. A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired. . . . Representation elections in a large segment of the industry are not feasible to

demonstrate . . . majority status due to the short periods of employment by specific employers. [S. Rep. 187, 86th Cong., 1st Sess. 27-28, 55-56 (1959), reprinted in LMRDA Leg. Hist. 423-24, 451-52.]

The Committee bill, with some amendments irrelevant to the prehire issue, was passed by the Senate by a vote of 90-2. 1 LMRDA Leg. Hist. 1257. As passed, the bill retained the pre-hire provision that the Committee had reported. 1 LMRDA Leg. Hist. 579-80. Once again however, this Kennedy pre-hire provision had to survive a collision with the Eisenhower "Board certification" proposal, this time in conference. The final House version, the Landrum-Griffin bill, contained the Eisenhower/Smith pre-hire provision. The difference between the two bills was not the subject of much debate in the House, mainly because of the many differences between the House Education and Labor Committee reported bill and the Landrum-Griffin substitute amendment. (The substitute was adopted in toto—by a vote of 229-201. 2 LMRDA Leg. Hist. 1691-92.)

In conference the House receded to the Senate on the prehire issue. Senator Goldwater and Representative Griffin advised their respective bodies that the "broader provision" of the Senate bill pertaining to pre-hire agreements was adopted by the Conference Committee, 2 LMRDA Leg. Hist. 1454, 1713. Senator Kennedy and Representative Thompson reported that the "restrictive and unworkable provisions" of the Landrum-Griffin bill with respect to the pre-hire issue were dropped. 2 LMRDA Leg. Hist. 1432, 1721.

The conferees found the Kennedy-Ervin pre-hire provision to be the proper solution. This provision, which ultimately became section 8(f), allowed pre-hire agreements in the absence of a showing of the union's majority status; sanctioned hiring hall arrangements; and authorized inclusion of the 7-day union security provisions. It ultimately was approved by the full Congress and signed by President Eisenhower as part of the Labor-Management Reporting and Disclosure Act of 1959. The members of the Senate had numerous opportunities to adopt a proposal to allow the NLRB to certify the majority status of the union party to each proposed pre-hire agreement. They rejected that view, in favor of a less restrictive approach which allowed employers to contract with unions as the exclusive representatives of the employees without the necessity of a Board order. In so doing, Congress intended for section 9(f) of the LMRDA to accord pre-hire agreements in the construction industry the same status and to have the same force and effect under the Act as section 9(a) agreements.

Section 8(f) of the National Labor Relations Act provides:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because

(1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is latter, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of services with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

V. HEARING

The Subcommittee on Labor conducted a public hearing on June 4, 1987 in Washington, D.C. Senator Metzenbaum chaired the hearing and Senators Kennedy, Hatch, Quayle, Stafford, Humphrey, Matsunaga, and Harkin were present.

The following individuals provided testimony:

Arthur F. Rosenfeld, Special Assistant to the Solicitor; representing the Department of Labor;

Robert A. Georgine, President; representing Building and Construction Trades Department, American Federation of Labor-Congress of Industrial Organizations, accompanied by Laurence Cohen, General Counsel; and Leo Zeferetti, Legislative Director;

Robert Y. Farrington, Executive Secretary-Treasurer; representing Ohio State Building and Construction Trades Council;

Charlie E. Key, Business Manager; representing the North Georgia Building Trades Council;

John Gast, Jr., President; representing Contractors Welding of Western New York, Inc.;

Richard E. Heckert, Chairman and Chief Executive Officer, E.I. duPont De Nemours and Co., Inc.; representing duPont, Business Roundtable, U.S. Chamber of Commerce, and National Association of Manufacturers, accompanied by Charles Brown, Vice President of duPont engineering and Leo Hannon, Managing Counsel, Labor Law for duPont;

William A. Pogue, Chairman and Chief Executive Officer; representing CBI Industries, Inc., accompanied by Bob McNeily, Labor Counsel;

Howard Jenkins, Special Counsel; representing National Association of Minority Contractors, accompanied by Ralph C. Thomas, Executive Director.

VI. COMMITTEE VIEWS

Congress has long recognized the need for enacting provisions to take proper account of the unique circumstances of the building and construction industry. Much of the industry is characterized by seasonal work, short job duration, and employees working for many different employers at many different sites. The workforce is in a constant state of flux. As a result, the time-consuming election procedures designed for other workplaces covered by federal labor law are essentially useless in the construction industry at the start of a job.

Even before enactment of the National Labor Relations Act, workers in the construction industry depended upon the collective bargaining process to assure fair wages, safe working conditions and job opportunities. Contractors also sought to negotiate and contract with organized workers, oftentimes even before a job began, so that they could accurately predict their labor costs and so they could be assured of an adequate skilled labor pool.

Congress enacted the NLRA in 1935 to protect employee rights to bargain collectively but failed to take proper account of the peculiarities of the construction industry with respect to the union representation election procedures at that time. In the course of amending the Act in 1959, Congress specifically sought to accommodate it to the unique conditions present in the building and construction industry.

The "Building and Construction Industry Labor Law Amendments of 1987" is a "contract driven" bill designed to correct the misinterpretation of the 1959 Amendments to the NLRA by the National Labor Relations Board and the courts. Because the NLRB has failed to enforce certain provisions of the National Labor Relations Act in the manner which Congress had intended, the stability of labor relations in the vital building and construction industry has eroded. The problem is very real, with no probability of rectification by the Board. It is the Committee's view that corrective legislation from Congress is the only solution to this serious and growing concern.

Specifically, the Board has permitted employers in the construction industry to avoid their collective bargaining agreements by repudiating voluntary prehire collective bargaining agreements and unilaterally terminating bargaining relationships, and by establishing closely-related companies to operate on a nonunion basis. These issues are closely interrelated and are necessarily dealt with simultaneously in this legislation. S. 492 establishes principles to deal with both parts of this problem.

The bill ensures that employers in the construction industry abide by contractual commitments they have voluntarily entered with unions in that industry. It restricts the practice of double breasting, whereby an employer avoids contractual obligations with a signatory labor organization by utilizing a nonunion subsidiary to perform work subject to a collective bargaining agreement. The bill also prohibits employer repudiation of valid prehire agreements or bargaining relationships while protecting the right of workers to decertify an unwanted union.

This legislation is "contract driven" in the sense that it applies only to the terms and provisions of a collective bargaining agreement that has been signed by both management and labor. The geographical scope of the legislation is limited to that geographical area described by the definitive terms of the particular collective bargaining agreement. The type of work affected by this legislation will be, in each instance, only that work which is specifically described in the contract which the legislation seeks to enforce. S. 492 does not seek to give unions or workers any new rights or privileges; it only requires the restoration of employee rights in the building and construction industry which Congress created and intended to protect in 1959 when it amended the National Labor Relations Act.

PREHIRE AGREEMENTS

Section 2(c) of the bill revitalizes the original purpose and intent of section 8(f). The new provision specifies that a collective bargaining agreement, lawfully entered into pursuant to section 8(f), is of the same force and effect under the Act as an agreement entered into pursuant to section 9(a). This force and effect includes the continuing obligation to bargain with the union in good faith upon the expiration of the agreement unless and until the NLRB conducts an election and certifies that a majority of the covered employees either have selected another bargaining representative or have chosen not to be represented. The 1959 legislative history shows that this amendment is consistent with Congressional intent at the time of the passage of section 8(f).

In 1959, with the passage of the Labor Management Reporting and Disclosure Act, the 86th Congress adapted the NLRA to the realities of the construction industry, so that employers and unions could enjoy the Act's benefits as well as its burdens. Congress' overall aim in enacting section 8(f), the prehire provision, was "to create the conditions and procedures whereby all parties in the construction industry can, as far as practicable, enjoy the same rights and privileges that have long been regarded as a matter of course in other industries." (Senator Barry Goldwater, 2 LMRDA Leg. His. 1082.)

It was clearly Congressional intent to bring the stability of a collective bargaining relationship to an industry in which the start of each new project would otherwise be an occasion for recontesting and redetermining the terms and conditions of employment that would prevail for the short time needed to complete the work to be done. Congress decided to create a special means by which unions in the construction industry could attain the status of an exclusive representative and negotiate agreements "on an equal basis . . . with unions in other industries." (Senator Goldwater, *Ibid.*)

The reason that the construction contractors, the unions, the Administration and Congress made such proposals is plain—all agreed that, because of the casual and intermittent nature of employment in the construction industry, it is entirely impracticable to hold representation elections in that industry before the start of a job. While all agreed on this point, there was disagreement on the details of the special "prehire" mechanism to be created.

The Eisenhower Administration, its supporters in Congress, and the construction employers favored legislation which would authorize the NLRB to certify a construction union as the exclusive representative, without an election, on the basis of the existence of a past bargaining relationship. The Senate Labor Committee and organized labor favored a less restrictive approach, which would allow construction unions to obtain the status of exclusive representative through voluntary employer recognition without the necessity of a Board order. It was this latter approach that was incorporated into section 8(f), the prehire provision of the National Labor Relations Act. Congress thus intended prehire agreements, like the other valid forms of voluntary recognition, to operate so as to make the labor organization the exclusive representative of the agreed-upon bargaining unit.

DEKLEWA DECISION

Unless section 8(f) is understood to treat prehire recognitions and prehire agreements as sufficient to establish a union's status as exclusive representative, the section fails of its essential purposes. There is no doubt that Congress intended to bring stability to collective bargaining relationships in the construction industry with the passage of the 1959 amendments. Unfortunately, despite congressional intent to stabilize labor relations with the passage of section 8(f), the National Labor Relations Board has been remarkably inconsistent in its decisions affecting the construction industry and has therefore made a significant contribution to instability in the collective bargaining process in that industry. One clear indication of the Board's inconsistency in the interpretation of section 8(f), is the fact that the Board in *John Deklewa & Sons*, 282 NLRB No. 184 (1987), saw the need to reexamine and revise the entire scope of section 8(f) law, because of what the Board admitted were "several shortcomings in current Board law" (slip opinion, p. 14). The *Deklewa* decision, overturned several earlier interpretations of the status of prehire relationships between unions and contractors. In *Deklewa*, the Board reviewed and essentially rewrote the rules governing the effect and enforcement of prehire agreements in the construction industry. The *Deklewa* decision, instead of clarifying this area of the law, is likely to cause a continuation of destabilization of bargaining relationships.

Prior to this decision, the Board had allowed unilateral repudiation of prehire agreements in midterm by employers, unless the union could "prove majority support in the employer work force or on each and every employer job site." (See *R.J. Smith Construction Co.*, 191 NLRB 693 (1971); *Higdon Construction Co.*, 216 NLRB 45 (1978).) The Board's interpretation under these cases ignored the realities of the construction industry that section 8(f) was fashioned to address. The reality was and still is that because of the constantly changing work force and job sites, a representation election held among an employer's workforce at a particular time is far less reliable in these circumstances than when the workforce is constant. Congress drew the distinction that when a construction industry employer and a union are willing to establish a collective bargaining relationship, the parties should be permitted to do so and that

a representation election should be required as a condition to maintaining such an agreement only when the requisite number of employees (30%) indicate their desire to have such an election.

The *R.J. Smith* and *Higdon* decisions granted to construction industry employers the benefits of section 8(f) while at the same time freeing them from the basic obligations imposed on any party signing a contract—the obligation to observe the terms of the contract. This one-sided arrangement fashioned by the Board certainly is not what Congress intended in 1959.

In that sense, the *Deklewa* decision is responsive to the criticism directed at the *R.J. Smith* and *Higdon* line of cases. The Board in *Deklewa* overruled *R.J. Smith* and its progeny and held that a prehire agreement is binding and enforceable throughout the term of that agreement. If the agreement is repudiated in midterm, that repudiation will be an unfair labor practice under the NLRA.

In other respects however, the *Deklewa* decision is extremely troubling and unsettling and fails to recognize the full import of Congressional intent in 1959. While the Board held that a prehire agreement may not be repudiated during its term, it also held that the moment that the prehire agreement expires, the employer has no continuing duty even to bargain with the union. In every other industry, once a union is declared an exclusive bargaining representative, that union enjoys a rebuttable presumption of majority status at the conclusion of agreements unless there has been a decertification petition and election which is lost by the union. To deny this presumption in prehire agreements is an incorrect assumption by the Labor Board, and S. 492 will correct this misinterpretation by giving the section 8(f) agreement the same force as a section 9(a) collective bargaining agreement.

The Board also held that upon the expiration of a prehire agreement, a union may not use economic pressure to compel the employer to bargain in good faith for a new agreement. Because the Board said there is no presumption of majority status, picketing in this instance could be considered recognitional and as such would be violative of section 8(b)(7) if conducted for a period of time not to exceed 30 days.

While the Board took one step forward in overruling its old *R.J. Smith* line of cases, it took several steps backward in its other holdings in the case. It seems likely that these other holdings will result in continued destabilization of bargaining relationships in the construction industry, particularly with respect to multiemployer bargaining relationships. Moreover, *Deklewa* gives employers the right to unilaterally terminate a bargaining relationship, but leaves the employees with no say in the matter. The decision raises many unanswered questions which will undoubtedly be the source of litigation and uncertainty for many years to come. Indeed, the *Deklewa* case is under appeal to a United States Court of Appeals by both parties. Case law in this area remains not only unfair but unsettled.

Section 2(c) of S. 492 will allow an 8(f) agreement to create the same obligations and receive the same considerations that other collective bargaining agreements get under the NLRA. It is the Committee's judgment that this was the original intent of Congress. Section 2(c) provides:

An agreement lawfully made pursuant to this subsection shall impose the same obligations under this Act as an agreement made with a majority representative pursuant to section 9(a);

The legal rule stated in section 2(c) serves the essential purpose of assuring that section 8(f) collective bargaining agreements are mutually binding and thus a basis for stable and productive labor relations. This section also would serve to negate the regressive aspects of the *Deklewa* decision, and particularly the refusal of the Board to apply in the construction industry the same rebuttable presumption of continued majority status that it applies in all other industries.

Further proof that Congress intended the section 8(f) relationship to be binding in the same way as a section 9(a) relationship lies in the proviso to 8(f) which states that a prehire agreement "shall not be a bar to a petition filed pursuant to section 9(c)." This proviso makes sense only if the prehire agreement otherwise would constitute a valid recognition which would, (without the proviso), bar a representation election. If the prehire agreement would not suffice to establish the union as the exclusive representative, the proviso would be pointless. With a full compliment of employees on the job and described in the contract, a decertification election can be conducted expeditiously by the Board to determine the employees representational desires.

Many of the arguments against this prehire portion of the bill are in fact arguments against section 8(f) itself. The unique conditions of the construction industry are as pressing today as they were in 1959. This bill does not create any new benefits or powers under Section 8(f). Section 2(c) simply accomplishes the objectives that Congress intended in 1959, but that Board decisions have thwarted in the intervening years.

DOUBLE BREASTING

The Committee heard testimony from both management and union representatives detailing the recent proliferation of the practice of "double breasting" among contractors in the building and construction industry. While some witnesses maintained that this method of operation is merely a necessary part of doing business, others testified that the practice of "double breasting" in the construction industry was in many cases, used as a subterfuge to evade the obligations stated in collective bargaining agreements. The Committee emphasizes that this legislation is contract driven. It is not a measure to completely prohibit "double breasting," when that practice is utilized in a fashion that does not undermine existing collective bargaining agreements.

The Committee also heard testimony from the National Association of Minority Contractors who expressed concern that this legislation would eliminate minority contractors from the construction industry. In response to this concern, the Committee received a letter cosigned by the Chairman of the Congressional Black Caucus, Representative Mervyn Dymally, and 2 other members of the Congressional Black Caucus, Representative Augustus Hawkins (Chairman of the House Committee on Education and Labor) and

Representative William Clay (Chairman of the Subcommittee on Labor-Management Relations.) The letter refutes the misconceptions held by the Minority Contractors testimony. The letter concludes that the legislation is designed to require employees to abide by their collective bargaining agreements and "thereby protects the ability of workers, black and white, to exercise a voice in the determination of their wages and working conditions." The full text of the letter follows:

CONGRESS OF THE UNITED STATES,
Washington, DC, September 2, 1987.

Hon. EDWARD M. KENNEDY,
Chairman, Committee on Labor and Human Resources, U.S. Senate,
Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN KENNEDY: During hearings on S. 492, the Construction Industry Labor Law Amendments of 1987, held by the Subcommittee on Labor, an allegation was raised that this legislation would adversely impact minority owned construction companies. Interestingly, this allegation was not raised before the Subcommittee on Labor-Management Relations or the Committee on Education and Labor, both of which are chaired by members of the Black Caucus, when it considered and reported H.R. 281, the House companion bill. Given the clear fallacy of the argument, our initial inclination was to dismiss the allegation. We have recently learned, however, that the allegation is being repeated and may be taken seriously by some Members of the Senate. We, therefore, are writing to share our views concerning what we strongly feel to be an inaccurate characterization of the legislation.

There is not a single provision in either S. 492 or H.R. 281 that in any way may be said to have a disparate impact on minority contractors. Proponents of this argument point out that the majority of minority contractors are nonunion; yet, given that S. 492 and H.R. 281 have no effect upon nonunion contractors it is difficult to perceive any relevance to such an assertion. Some have argued that the legislation somehow precludes union and nonunion subcontractors from working on the same project; however, since there is nothing in the legislation that produces such a consequences this argument, at best, represents a serious misunderstanding of the provisions of the bills. Finally, it cannot seriously be argued that requiring minority contractors to live up the provisions of collective bargaining agreements that they have voluntarily entered in the first instance would be anymore burdensome of unfair than requiring anyone else to live up to their word.

While neither S. 492 nor H.R. 281 has any disparate impact on minority contractors, the legislation does have positive benefits for both the minority community and for workers generally, as illustrated by the fact that H.R. 281 was supported by the entire membership of the Congressional Black Caucus. As the law is presently interpreted, employees in the construction industry are helpless to protect their ability to engage in collective bargaining. S. 492 and H.R. 281 requires employers to abide by the terms and conditions of their collective bargaining agreements. The legislation thereby protects the ability of workers, black and white, to exercise a voice in the determination of their wages and working conditions. For

many Black Americans, in the construction industry as well as other industries, the ability to improve their wages and working conditions through collective bargaining is their surest means of enhancing their standard of living.

Sincerely,

AUGUSTUS F. HAWKINS,
Chairman, Committee on Education and Labor.

WILLIAM L. CLAY,
Chairman, Subcommittee on Labor-Management Relations.

MERVYN M. DYMALLY,
Chairman, Congressional Black Caucus.

The Board has failed to provide stability in the collective bargaining process in the construction industry for any race, color, or creed by allowing contractors virtually to ignore otherwise enforceable contracts. This is achieved by permitting a union-signatory contractor to create or acquire a related nonunion contractor and to funnel work from the union company to the nonunion company for purposes of evading the prehire agreement.

In the "double breasting" line of cases, the Board has drawn a blueprint for construction industry employers who wish to evade the obligations stated in collective bargaining agreements by establishing so-called "double-breasted" companies. The Committee has received copies of contractor "how to" manuals that outlined the steps contractors could take to operate double breasted in a common geographical area and avoid any criminal or Labor Board prosecution. A typical example of this tactic is that company A, which has a collective bargaining agreement with a union, sets up a related company—company B—which is operated on a nonunion basis. In some cases, most of the work formerly done by company A is thereafter done by company B. In other situations, company A may go out of business altogether. There is no real cessation or diminution of the employers' activity in the industry, merely the termination of the right of employees to participate in that activity under the terms of a collective bargaining agreement. The Board has placed its imprimatur on this double-breasting device, and the result has been to spawn an even greater use of this technique. As one witness told the Committee, "double breasting feeds on itself"; if one contractor is doing it and getting away with it, then others are compelled to follow suit.

The leading Board precedent is *Peter Kiewit*, 206 NLRB 562 (1973) and the subsequent decision in *Kiewit Sons Co.*, 231 NLRB 76 (1977). Peter Kiewit Sons Co., a subsidiary of Peter Kiewit Sons, Inc., had been party to a collective bargaining agreement with the Operating Engineers in the State of Oklahoma covering the performance of highway construction work for many years. In 1972, for the first time, the parent company activated another subsidiary, South Prairie Construction Company, to bid on highway construction work in Oklahoma on a nonunion basis. South Prairie immediately began to secure such work and refused to recognize and abide by the Operating Engineers' collective bargaining agreement. Kiewit Sons Co., in the meantime, withdrew from bidding on highway construction work in the state. In practical terms, then, the

parent company shifted the work previously performed by its "union" subsidiary to its "nonunion" subsidiary.

The NLRB permitted this evasion of a binding contractual commitment, primarily on the theory that Kiewit Sons Co., and South Prairie each independently controlled its own day-to-day labor relations policies within the framework created by the parent company. *Peter Kiewit*, 206 NLRB 562 (1973). The United States Court of Appeals for the District of Columbia Circuit, however, rejected that theory. That court concluded that the proper test is whether there is "a substantial qualitative degree of interrelation of operations and common management—one that would not be found in the arm's length relationship existing among unintegrated companies." *Operating Engineers Local 627 v. NLRB*, 518 F. 2d 1040, 1047 (D.C. Cir. 1975). The Supreme Court affirmed that aspect of the D.C. Circuit's decision but sent the entire matter back to the Board to determine whether the employees of Kiewit Sons Co. and the employees of South Prairie constituted separate bargaining units. *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800 (1976). In its second opinion, the Board decided that even though the two companies constituted a single employer and were doing the same work in the same place, the employees of each company constituted a separate bargaining unit. *Peter Kiewit Sons, Inc.*, 231 NLRB 76 (1977). Thus, the Board, through a different legal formula, permitted the parent company to shift work from its "union" subsidiary to its "nonunion" subsidiary.

Sections 2(a) and (b) of the bill overrule the Board doctrine stated in the *Kiewit* decisions. The bill provides a test for determining single employer status in the building and construction industry which is consistent with the realistic approach followed in the D.C. Circuit's *Kiewit* opinion. It eliminates the bargaining unit test which the Board has applied in construction industry cases even after it has been determined that the companies are a single employer doing the same work in the same place.

Section 2(a), in modifying the definition of single employer, follows the approach of *Operating Engineers Local 627 v. NLRB*, supra, 518 F. 2d at 1047, quoted above. The D.C. Circuit majority emphasized the importance of evaluating whether an appropriate "arms length relationship" exists between the two entities. This approach focuses on the substance of the relationship between related entities and recognizes the common sense point that where the substantial common owners of two or more related companies establish a company to operate nonunion, the fact that the manager of each company makes day-to-day labor relations decisions within that framework does not mean that each company is a separate employer. It is the Committee's view that the single employer test in the bill, will require this "arms length" relationship to be present, between two or more employers, for them to operate legally doing the same work, in the same geographical area when one of them has signed a collective bargaining agreement. In contrast, the Board's present approach ignores the substance of such relationships; it focuses not on the central management decision that controls all other decisions—shall a nonunion company be established—but on the minutiae of how subsequent day-to-day decisions are made.

Section 2(b) of S. 492 rejects the bargaining unit analysis for the construction industry which the NLRB applied in the second *Kiewit* case. In so doing, the bill merely requires a single employer to apply its collective bargaining agreement to all of his employees performing the work described in the contract within the geographic area described in the contract. The single employer is precluded from escaping from the contractual obligations to his employees, by asserting technical bargaining unit defenses, in those situations in which the employer seeks to perform the describe work in the described area through a nominally separate entity. Again, and in contrast to Board decisions, the legislation is contract driven in that it takes into account the reality of the kind of work the employees are doing and the area in which that work is being done. S. 492 will discount mere surface arrangements devised by the employers's legal counsel to frustrate collective bargaining.

VII. CHANGES MADE BY KENNEDY SUBSTITUTE AMENDMENT

The changes that were made by this substitute amendment were made for the specific purpose of clarifying the intent of the bill. The changes further emphasize the "contract driven" nature of this legislation.

To end the erroneous perception that this bill seeks to permit or authorize common situs picketing, the amendment made two changes. First, a new proviso was added in Section 2(a) of the original bill which states explicitly, "that the terms and provisions of a contractor-subcontractor relationship between any two or more business entities working at a construction site shall not be deemed to create a single employer or be considered as evidence of direct or indirect common management or control."

Secondly, the work "supervising" in the first sentence of the original bill has been deleted, further clarifying that single employer status is not created by the existence of the contractor-subcontractor relationship. Also, the words "terms and provisions" replaced the word "existence," and the words "by itself" were removed after "contractor-subcontractor relationship," in conjunction with this clarification. It is now clear beyond any fair debate that the bill does not authorize or intend to authorize "common situs picketing" at a construction site.

The test to determine single employer status in Section 2(a) of the bill was modified by adding the word "substantial" before the phrases "common management" and "common control." This modification was made in response to concerns that a small degree of common management or control could lead to single employer status.

The references in the original bill to the "construction industry" are changed to "building and construction industry," to reflect the language used in Section 8(f) of the NLRA. These modifications were made to emphasize that the bill will only pertain to building and construction industry contractors.

The phrase "in the same or in different geographical areas" from the bill as introduced, has been changed to "within the geographical area" covered by the collective bargaining agreement in ques-

tion. This change elucidates that this is a "contract driven" piece of legislation.

The words "same or similar work" had been criticized as being overbroad in how they could be interpreted. In response to this claim, the Kennedy amendment replaced them with a narrower reference to the "same" type of work that is defined in the agreement.

Each of these changes is intended to clarify and refine the intention and effect of the bill. The alterations made by the committee should make it clear that S. 492 is directed to correct two areas of misinterpretation by the NLRB that adversely effect the stabilization of the collective bargaining process in the building and construction industry—contract repudiation and contract avoidance through the device of dual shops.

The committee heard testimony from Robert Georgine, Robert Farrington, Charlie Kay and John Gast detailing the demise of the stability in construction industry collective bargaining processes. When the NLRB allowed employers unilaterally to repudiate prehire agreements from 1971 to 1987, employees and unions often found themselves in a weak and tenuous bargaining position, knowing that at any time the employer could walk away. Now that the NLRB has reversed itself and stated that prehire contract repudiation is no longer legal, the unions continue to find themselves in a difficult position because employers are regularly establishing non-union subsidiaries to underbid for work that might otherwise be done by their union subsidiary. These are not "arms length" relationships when there is substantial common ownership, management or control. Good faith in collective bargaining is the cornerstone of the National Labor Relations Act, and S. 492 is necessary to restore the impetus to bargain in good faith in the building and construction industry.

VIII. TABULATION OF VOTES

A. SUBCOMMITTEE ON LABOR

The Subcommittee approved the bill without amendment for consideration by the full Committee by voice vote.

B. COMMITTEE ON LABOR AND HUMAN RESOURCES

Roll call votes taken during the Committee consideration of this legislation are as follows:

1. Hatch amendment number 1, which would make the bill effective only upon the holding of a "ratification election" at each non-union operation of an employer. Amendment rejected 5 yeas, 11 nays: Yeas—Hatch, Quayle, Thurmond, Cochran, and Humphrey. Nays—Kennedy, Pell, Metzenbaum, Matsunaga, Dodd, Simon, Harkin, Adams, Mikulski, Stafford, and Weicker.

2. Hatch amendment number 2, to provide a two-year period during which an employer may withdraw from any current collective bargaining agreement without incurring any liability either under the collective bargaining agreement or under the Multiemployer Pension Plan Amendments Act. Amendment

rejected 5 yeas, 11 nays: Yeas—Hatch, Quayle, Thurmond, Cochran, and Humphrey. Nays—Kennedy, Pell, Metzenbaum, Matsunaga, Dodd, Simon, Harkin, Adams, Mikulski, Stafford, and Weicker.

3. Hatch amendment number 3, to exempt from the applications of the bill, existing dual shop operations which are conducted in accordance with current law. Amendment rejected 5 yeas, 11 nays: Yeas—Hatch, Quayle, Thurmond, Cochran, and Humphrey. Nays—Kennedy, Pell, Metzenbaum, Matsunaga, Dodd, Simon, Harkin, Adams, Mikulski, Stafford, and Weicker.

4. Hatch amendment number 4, repealing the construction industry "hot cargo" exception in section 8(e) of the National Labor Relations Act. Amendment rejected 5 yeas, 11 nays: Yeas—Hatch, Quayle, Thurmond, Cochran, and Humphrey. Nays—Kennedy, Pell, Metzenbaum, Matsunaga, Dodd, Simon, Harkin, Adams, Mikulski, Stafford, and Weicker.

5. Hatch amendment number 5, codifying the duty of fair representation and including both local and international unions within the term "labor organization." Amendment rejected 5 yeas, 11 nays: Yeas—Hatch, Quayle, Thurmond, Cochran, and Humphrey. Nays—Kennedy, Pell, Metzenbaum, Matsunaga, Dodd, Simon, Harkin, Adams, Mikulski, Stafford, and Weicker.

6. Metzenbaum motion to table Hatch amendment number 6 which amends the Hobbs Act to redefine "extortion." The motion agreed to 11 yeas, 5 nays: Yeas—Kennedy, Pell, Metzenbaum, Matsunaga, Dodd, Simon, Harkin, Adams, Mikulski, Stafford, and Weicker. Nays—Hatch, Quayle, Thurmond, Cochran, and Humphrey.

7. Quayle amendment providing that any labor organization found by a "competent authority" to have discriminated in the operation of a hiring hall or referral service may not become the exclusive representative of any employees as a result of this bill or make any collective bargaining agreement applicable to such employees until that "competent authority" has determined that the hiring hall or referral service is no longer being operated in a discriminatory manner. Amendment rejected 6 yeas, 10 nays: Yeas—Hatch, Stafford, Quayle, Thurmond, Cochran, and Humphrey. Nays—Kennedy, Pell, Metzenbaum, Matsunaga, Dodd, Simon, Harkin, Adams, Mikulski, and Weicker.

8. Kennedy motion to report the bill with an amendment in the nature of a substitute, out of the committee favorably. Motion agreed to 10 yeas, 6 nays: Yeas—Kennedy, Pell, Metzenbaum, Matsunaga, Dodd, Simon, Harkin, Adams, Mikulski, and Weicker. Nays—Hatch, Stafford, Quayle, Thurmond, Cochran, and Humphrey.

IX. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, December 16, 1987.

HON. EDWARD M. KENNEDY,
Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 492, the Building and Construction Industry Labor Law Amendments of 1987, as ordered reported by the Senate Committee on Labor and Human Resources on December 9, 1987. The bill would amend the National Labor Relations Act to increase the stability of collective bargaining in the building and construction industry.

We expect that enactment of the bill would result in no additional costs to the federal government, or to state and local governments.

If you have further questions, please call me or have your staff contact Michael Pogue (226-2820).

With best wishes,
Sincerely,

EDWARD M. GRAMLICH,
Acting Director.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 11, 1988.

HON. EDWARD M. KENNEDY,
Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office (CBO) has reexamined S. 492, the Building and Construction Industry Labor Law Amendments of 1987, as ordered reported by the Senate Committee on Labor and Human Resources on December 9, 1987. This letter serves as a revision of CBO's cost estimate letter of December 16, 1987.

S. 492 would amend the National Labor Relations Act by preventing "double-breasting" by employers. "Double-breasting" is when an employer maintains a union and a non-union shop for the purpose of differentiating on wages and benefits on separate contracts. The bill would require an employer to pay its non-union employees at the level of pay similar to union employees.

To the extent that union members are paid more than non-union workers, this bill could increase the construction costs of certain federal projects. On the other hand, the legislation could lead a contractor to become an entirely non-union employer, which would lead to either no increase in federal costs or perhaps a savings. However, CBO has no data on which to estimate the magnitude of the overall changes. Further, increases in federal spending would occur only to the extent that additional appropriations are made to fund the increase in construction costs. State and local governments would be affected in a similar manner.

If you have further questions, please call me or have your staff contact Michael Pogue (226-2820).

Sincerely,

ROBERT F. HALE

(For James L. Blum, Acting Director).

X. REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the following statement of the regulatory impact of S. 492 is made.

A. ESTIMATED NUMBER OF INDIVIDUALS AND BUSINESSES REGULATED AND THEIR GROUPS OF CLASSIFICATIONS

It is estimated that the bill would regulate all employers and employees engaged primarily in the building and construction industry. There are over 5 million employees and roughly 1 million firms in that industry, but most companies operate either union or non-union, and would not be affected by the limitation on the practice of double-breasting contained within sections 2(a) and 2(b) of the bill. All construction companies would be regulated by the provisions contained within section 2(c) regarding repudiation of pre-hire agreements, but the vast majority of firms do not engage in this practice, and would not be affected by the bill.

B. ECONOMIC IMPACT ON THE INDIVIDUALS, CONSUMERS, AND BUSINESSES AFFECTED

It is difficult to estimate the impact of the bill on individuals and consumers, because it is unclear how many proscribed double-breasted entities will choose, during the one year grace period before the effective date, to go completely union or completely non-union in a given geographic area. One statement at the hearing estimated that approximately 100,000 individuals who work for the non-union side of a double-breasted entity would be covered by the collective bargaining agreement of the union side, as a result of this bill. But under the bill only individuals working for double-breasted entities which signed a collective bargaining agreement to perform specified work in a specified geographic region under that agreement would be affected.

Businesses engaged primarily in the building and construction industry, currently operating as double-breasted entities, would be prohibited from doing so in the future, but only to the extent of the terms described in the collective bargaining agreement they voluntarily signed. Those firms affected could continue to operate non-union on work not described in the agreement, and non-union in geographic regions not covered by the agreement.

C. IMPACT OF THE ACT ON PERSONAL PRIVACY

The bill would have no impact on the personal privacy of individuals affected by the bill.

D. ADDITIONAL PAPERWORK, TIME, AND COSTS

The bill would impose no additional paperwork or related costs to those affected by the bill, or the agencies charged with the duties to administer and enforce the amended statute.

XI. SECTION-BY-SECTION ANALYSIS

The First Section of the bill provides that the bill may be referred to as the "Building and Construction Industry Labor Law Amendments of 1987."

SECTION 2

Section 2(a) of the bill amends Section 2(2) of the National Labor Relations Act (NLRA) by adding a new sentence which provides that when there is direct or indirect substantial common ownership, substantial common control or substantial common management between two or more business entities engaged primarily in the building and construction industry, and when such entities perform work within a geographical area covered by a collective bargaining agreement to which one of the entities is a party and such work is also described by that agreement, the several entities shall be deemed to be a single employer. Section 2(a) further provides that a contractor-subcontractor relationship does not establish single employer status, nor may it be considered as evidence of common control or common management for the purpose of establishing single employer status. This new definition, coupled with Section 2(b) of the bill, is intended to put an end to the practice of double breasting in the construction industry, whereby an employer is able to bring in a company to perform work on a nonunion basis that the employer had previously committed to do on a union basis, while also explicitly ensuring that the new language is not applied to non-construction employers nor interpreted as permitting common-situs picketing. Finally, regardless of substantial common ownership, substantial common control or substantial common management, the language does not establish single employer status between two business entities in the construction industry if one is operating solely outside of the geographical area covered by the collective bargaining agreement of the other, or if one is performing only work other than that described in the collective bargaining agreement of the other. The terms of the collective bargaining agreement control the definition.

Section 2(b) of the bill adds a new sentence to Section 8(d) of the NLRA which defines the duty to bargain collectively. Under this new provision, the duty to bargain under Section 8(d) requires a business entity, which comprises part of a single employer in the construction industry as defined in the amended Section 2(2) of the NLRA to apply the terms of its collective bargaining agreement to all other business entities which comprise the single employer and are performing the work described in the collective bargaining agreement within the geographical area covered by the agreement. A collective bargaining agreement that is limited to one kind of work, such as plumbing work, may not be applied to an entity performing only another kind of work, such as carpentry work, re-

ardless of where that work is performed; and an agreement that is limited to a specific locality may not be applied outside of that locality regardless of the kind of work that is being performed.

Section 2(c) of the bill amends Section 8(f) of the NLRA in two respects. First, it provides that an agreement which has been made in a lawful manner pursuant to Section 8(f) shall impose the same obligations under the NLRA as an agreement with a majority bargaining representative under Section 9(a) of the NLRA. Second, it provides that lawful 8(f) agreements may be repudiated only after the NLRB conducts an election and certifies that a majority of the employees in an appropriate bargaining unit have selected another bargaining representative or have chosen not to be represented by any labor organization. These changes assure the effectiveness of 8(f) pre-hire agreements, validated by Congress in 1959, while continuing to provide protection for employees in the choice of a bargaining representative through the use of the NLRB decertification procedure.

SECTION 3

Section 3 of the bill provides that the amendments made by Section 2 of the bill shall generally be effective upon enactment except that the provisions of Section 2(b) of the bill shall not take effect until one year after the date of enactment with respect to any construction project contracted for, prior to the date of enactment. Contracts for construction projects entered into, on or after the date of enactment of this bill, are covered by the provisions of Section 2(d). The exceptions to the general effective date of the bill are intended to ensure that the bill does not unduly disrupt those construction projects that are ongoing as of the date of enactment.

XII. MINORITY VIEWS

We strongly dissent.

Our reasons for opposing this bill are numerous. First, the bill's underlying premise—that there is no such thing as a legitimate dual shop operation in the construction industry—is false. The bill makes no distinction between the many legitimate dual shop concerns in existence and those few “sham” operations which are already illegal under current law. Second, the bill would force union contracts upon non-signatory employers who neither negotiated the terms of the contract nor agreed to be so bound, and upon non-union employees who have not given their consent. It would, in effect, require many construction workers to join unions in non-Right-to-Work states, and, in all states, to go through union hiring halls to keep their jobs. Third, the bill would have a disparate impact on black and women construction workers, and on minority subcontractors. Fourth, the bill would raise the costs of construction and reduce competition in the industry. Fifth, there simply is no demonstrated need for this legislation, since the alleged abuses of which the proponents of the bill complain are more than adequately covered by current law. And sixth, as with any proposed change to our nation's complex and carefully crafted labor laws, S. 492 may well have far-reaching and, perhaps, unintended consequences extending beyond those contemplated by the majority.

Moreover, as is readily apparent even to one uninitiated in the minutiae of labor law, S. 492 is designed to benefit the narrow interests of one group—building and construction trades unions, who already receive preferential treatment under the law—to the detriment of the vast majority of contractors and construction workers in this country. The effect of this bill is not to give construction workers expanded job opportunities; its unstated purpose is to take jobs from one group of workers and to give them to another. Its effect is not to create new union construction jobs based upon competition in the marketplace or negotiations with employers at the bargaining table; its purpose is to inject Congress in the process of labor-management relations by extending union contracts, through operation of law, to cover non-signatory employers and their employees. No evidence has been given to the Committee which warrants eliminating for open shop workers the fundamental right of our labor laws—the right to choose whether to be represented and who that representative will be.

Oddly enough, while the purpose of the bill may be to increase union membership in the construction trades, its primary consequence may actually be the diminution of union construction in the United States. It is clear that the bill will have a de-stabilizing influence on the construction industry and on construction labor relations. To some extent, this has already occurred. Many long-term, national relationships between union contractors and their con-

struction unions have been jeopardized by the mere introduction of S. 492, because many employers are beginning to realize that national, area and local agreements may jeopardize the ability of contractors to continue to compete for work if the bill becomes law.

I. DUAL SHOP OPERATIONS

A. Background

A legitimate "dual shop" or "double breasted" operation is nothing more sinister than a standard business arrangement found in the construction and other industries whereby the same corporation or individual owns two or more subsidiaries, at least one of which operates in the union sector of the construction market, while another works in the open shop sector. The two companies operate separately on a day-to-day basis. In practice and under law the companies are separate employers.

There are several myths about dual shop operations in the construction industry that the Committee hearings served to dispel. The first myth is that there is something underhanded or dishonest about this practice. Unlike the picture portrayed by the majority, there is nothing underhanded or dishonest about the usual dual shop operation. Dual shop operations in the construction industry are a well-established and widely accepted method of doing business. For example, approximately 20 of the country's 25 largest contractors operate on a dual shop basis. These contractors alone employ well over 100,000 workers. Many thousands more work for smaller dual shop organizations. Double breasting is a phenomenon which has resulted from the growth of the nonunion construction market over the past two decades. With increasing competition both at home and abroad, construction customers, since the early 1970's, have become highly sensitive to the cost of construction. As a result, more and more work has been awarded to open shop contractors, who on many occasions have been able to perform work at substantially lower costs due to less restrictive work rules. By some estimates more than 70% of commercial and industrial construction work today is performed on an open shop basis. Because many union contractors were unable to compete in the open shop market, they formed or became affiliated with independently managed and operated open shop companies which competed in that market, while their union companies continued to compete in the union market.

The second myth is that a dual shop enables a contractor to "funnel" work from a union company to an open shop, thus depriving union workers of jobs. There was no evidence submitted at the hearings before this Committee that such was the case. The maintenance of an open shop subsidiary does not divert work from a union subsidiary. Ultimately it is the construction customer who decides if a job is to be done union or open shop. If a union contractor is unable to obtain work because it is not competitive, legislation which would prevent it from owning an open shop company will not enable it to obtain new work. The testimony submitted by CBI Industries, Inc. is illustrative of the situation faced by many dual shop contractors. CBI Industries, Inc. is a holding company with at least five subsidiaries, two of which are in the construction

industry. CBI Services, its union construction company, found itself unable to compete with open shop contractors in many areas of the country. CBI Industries, therefore, founded an open shop subsidiary, CBI Na-Con, which was able to compete with open shop contractors and which regained a substantial share of the market which CBI Services had previously lost. Far from being underhanded about this, officials of CBI Industries went to the unions and told them in advance that they intended to create the new company, and their reasons for doing so. The evidence showed that the union employees of CBI Services would never have obtained any of the work which open shop CBI Na-Con was able to develop.

What is particularly galling is that the majority still contends that all dual shops operate in secret, and that their only purpose is to avoid collective bargaining agreements. The testimony before the Committee destroyed this myth, yet the majority would have us ignore reality and legislate by rhetoric.

It should be obvious to the most casual observer that if a union company is unable to compete in the open shop market, it has but two choices. First, it can become wholly nonunion and forsake the smaller union market altogether. Second, it can operate on a dual shop basis. If a contractor's objective is union avoidance, then the first alternative is the clear choice. But many contractors do not wish to avoid unions. They prefer to work with them in those sectors where they can compete successfully. Given the realities of the marketplace, the only way which many contractors can continue to work with unions at all is through dual shop arrangements. Dual shop operations, therefore, are not mechanisms for union avoidance, but rather mechanisms whereby contractors can maintain their relationships with unions.

Another myth is that union contractors are not living up to the terms of their collective bargaining agreements when they are affiliated with open shop companies. A company does not refuse to abide by the terms of its agreement simply because it is related to a nonunion affiliate. For example, national agreements between the construction unions and major contractors have been negotiated, renegotiated, and periodically allowed to renew for a number of years. These national agreements are maintained exclusively between a company's union construction subsidiary and the various International Building Trades. They are not signed by the parent or by the open shop subsidiary of the parent; they do not apply to such a non-signatory; they were never intended to apply beyond the signatory entity to the open shop subsidiary nor, over the years have they ever, in fact, been applied to such open shop subsidiaries. Thus the signatory unions are not the unknowing victims of deception with regard to the open shop affiliates of these contractors. Open shop affiliates of these contractors are of substantial size, openly maintained, have been in existence for years, and have their bids, contract awards, and general corporate doings regularly chronicled in industry journals of open circulation.

This bill would apply agreements, by operation of law, to entities to whom they were never intended to cover. The bill does not merely require signatory companies to fulfill obligations to which they have previously agreed. The bill imposes new obligations upon non-signatories wholly different from those to which the unions

themselves have previously agreed and of a nature as to which the parties might never have agreed at the bargaining table. In sum, the bill will destroy the integrity of many construction contracts, and will bind third parties to a contract to which they had never agreed to be bound.

What the majority fails to recognize is that a number of union construction contracts have been negotiated by the parties to acknowledge specifically the fact that non-signatory parent or subsidiary operations are not covered. For example, the national contract between the Iron Workers and the National Construction Association (Appendix 1) contains the following negotiated letter of intent:

Article 2: Scope reads in part:

"This Agreement shall be effective in all places in the United States where work is being performed or is to be performed by the Employer—or by any person, firm or corporation owned or financially controlled by the Employer,

... It is understood that this language requires all contractors signatory to this Agreement, as well as any subsidiary or corporation financially controlled by that signatory contractor, to comply with all the terms and conditions of this National Agreement. *However, the language of this Article and the terms of the Agreement do not run laterally or upward to parent, affiliates, other divisions or their subsidiaries and shall only apply individually after signature of such parent, affiliate, division or their subsidiaries.* (Emphasis added)

S. 492 would alter these collective bargaining agreements by extending them to other companies in contravention of the clear terms of the contracts themselves. No justification or explanation is given for this unprecedented intrusion into the collective bargaining process.

In addition, the record fails to support the myth that the current law is capable of widespread abuse. As former four-term NLRB Member Howard Jenkins testified at the Committee's hearings on S. 492:

If, as is the stated purpose of the legislation, it is to forbid and to prevent sham operations and efforts at subterfuge, I would conclude, based on my own experience at the Labor Board, that there is no need for it. Currently and consistently over the past fifteen years, the Labor Board and the courts have dealt effectively with those few contractors who attempt to evade their obligations under a collective bargaining agreement. . . . The Board has dealt with that and has provided adequate remedies.

A small number of illegal situations were described at the hearing, but these failed to demonstrate that the system now in place is incapable of remedying those few abuses that do exist. Indeed, most of the situations described could be (and in some instances have been) remedied under current law. In fact, the statistics which are available show that cases where abusive double breasting even is alleged are relatively rare. A survey covering the period October

1983 through July 1986 revealed that the NLRB received only 103 charges alleging the misconduct which the proponents claim this bill is designed to prevent. That is fewer than two (2) charges per state per year. This number is infinitesimal when compared to the total of approximately 100,000 unfair labor practice charges of all types (25,000 of which were filed against unions) filed in the same period. Although occasional instances of abuse may exist, there is no evidence that abuse is widespread or pervasive enough to warrant sweeping legislation, especially legislation such as this which would have so many negative ramifications.

B. Current Law

Under the law as applied by the National Labor Relations Board and the courts over the past 30 years, an employer may not create a "sham" paper subsidiary in order to avoid the terms of its collective bargaining agreements. On the other hand, the mere fact that two construction companies are owned by the same corporation or individual does not, in and of itself, make those two companies a single employer. In deciding whether or not two nominally separate companies constitute a single employer, the National Labor Relations Board and the courts apply a carefully crafted test to the specific facts in each case. A four factor analysis is utilized in making this determination. These factors are:

- (1) Interrelation of operations;
- (2) Common management;
- (3) Centralized control of labor relations; and
- (4) Common ownership.

Radio & Television Broadcast Union v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 256 (1965) (per Curiam). None of these factors is controlling, nor need they all be present. See, e.g., *NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378, 384 (9th Cir.), cert. denied, 444 U.S. 940 (1979). The Board has stressed the first three factors, with the greatest emphasis being placed on the presence of the common or centralized control of labor relations. *Sakrete, Inc. v. NLRB*, 334 F.2d 902, 905, n.4 (9th Cir. 1965); *NLRB v. Don Burgess Construction Corp.*, 596 F.2d at 384. Single employer status, however, ultimately depends on "all the circumstances of the case." *Id.*

The majority claims that Section 2(a) of the bill follows the approach of the court of appeals in *Local No. 627, IUOE v. NLRB*, 518 F.2d 1040 (D.C. Cir. 1975), *aff'd in part, vacated and remanded sub. nom., South Prairie Construction Company v. Operating Engineers Local No. 627*, 425 U.S. 800 (1976). However, it is clear that the court in *Local No. 627* did not hold that the factor of centralized control of labor relations should be given no weight, as does the bill, nor did it hold that the three remaining factors should be considered in the disjunctive, as does the bill. Indeed, the court said that "single employer" status "depends upon all the circumstances of the case." It specifically held that while centralized control of labor relations "is not critical in the sense of being the *sine qua non* of single employer status," it is one of the 'controlling criteria' and that "the degree to which such control is present (or absent) is, of course, one of the circumstances upon which 'single employer' status depends." *Id.* at 1046. Although the court of ap-

peals disagreed with the Board on the specific facts as to whether the two employers involved constituted a single employer, there is no indication that the Board or other courts have considered the decision in *Local No. 627* to be a departure from settled law. In fact, as Judge Tamm stated in dissent: "There is no dispute in this case regarding the applicable legal standard." *Id.* at 1050; 132 Cong. Rec. H1955 (Daily Ed., April 17, 1986). Indeed, the NLRB has cited *Local No. 627* with approval in numerous cases. See, e.g., *Joint Council of Teamsters No. 42*, 225 NLRB 209 (1976); *Malcolm Boring Co., Inc.*, 259 NLRB 547 (1981); *Ray C. Lapp Air Conditioning*, 270 NLRB 641 (1984); *NLRB v. Al Bryant, Inc.*, 711 F2d. 543 (3rd Cir. 1983).

A determination that two affiliated firms constitute a "single employer," however, does not necessarily establish that an employer-wide bargaining unit is appropriate, as the factors which are relevant in identifying the breach of an employer's operation are not conclusively determinative on the scope of an appropriate unit. *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers*, 425 U.S. 800, 805 (1976); *Central New Mexico Chapter, NECA*, 152 NLRB 1604, 1607 (1965). The Board, therefore, utilizes its expertise to determine whether two groups of employees of the same employer have a sufficient commonality of interest to constitute a single appropriate bargaining unit. Nevertheless, where the Board has found two nominally separate companies to constitute a single employer, it almost as a matter of course has found the employees of both companies to be in the same bargaining unit.

In addition, a company which has not agreed to be bound by the collective bargaining agreement of another company may nevertheless be held to that agreement if it is an alter ego of the signing company. E.g., *Hawg-N-Action*, 281 NLRB No. 13 (1986). The labor laws applied to single employer and alter ego situations have been consistently interpreted and enforced by the National Labor Relations Board and the federal courts for over 30 years, through both Republican and Democratic administrations. As recently stated by the so-called "Reagan Board" in *Walter N. Yoder & Sons, Inc.*, 270 NLRB 652 n.2 (1984):

A "double-breasted" operation is one in which a contractor operates two companies, one unionized and the other nonunionized. Depending on how the companies are structured and operated, each may be a separate corporation or else both may be so interrelated that they constitute a single employer or one may be the alter ego of the other. A collective bargaining contract signed by one of the companies would not bind the other, if each were a separate corporation, but would bind the other if both constituted a single employer and the employees of both companies constitute a single appropriate bargaining unit, or the non-signatory company is an alter ego of the signatory company.

In those cases where the Board has found unlawful "single employer" or alter ego operations used to evade collective bargaining agreements, it has utilized a wide range of remedies. For example, it has ordered the sham nonunion contractor to recognize and bar-

gain with the union, to abide by the terms of the existing contract, and to apply retroactively its terms and conditions. It has also ordered companies to make whole (including back pay) and affected employees, to hold each firm liable for the unfair labor practices of the other, and to make retroactive contributions to the union's pension and health and welfare funds. Moreover, a finding of single employer status is not limited to the particular job site where the charge arose. Rather a finding that several employers comprise one entity applies to all current and future projects. See, e.g., *Victor Block, Inc.*, 276 NLRB No. 70 (1985).

While the proponents of this bill have suggested that the National Labor Relations Board under the Reagan Administration has somehow changed, or is failing to enforce, the single employer law, neither allegation has any support in the record. As stated above, the law in this area has remained unchanged for over 30 years. Nor is there any evidence in the record to support the suggestion that the so-called "Reagan Board" is failing to enforce this area of the law. In fact, the evidence shows that the Board's handling of cases where it is alleged that an employer created another company and shifted work to that company compares favorably with the Board's handling of similar cases under the Carter Administration.

But even if a union were to feel uncomfortable before the National Labor Relations Board, it has other venues for enforcement of its contractual rights under the current law. Federal courts have jurisdiction under § 301 of the Labor Management Relations Act (29 U.S.C. § 185) to hear suits brought by unions or employers to enforce the collective bargaining agreement and to determine the single employer question. A union also can demand that the company with which it has a collective bargaining agreement submit the single employer issue to binding arbitration before a neutral third party pursuant to the contract.

C. Analysis

The bill would mandate application of collective bargaining agreements to open shop companies of dual shop concerns, where those companies are "performing the work described in the collective bargaining agreement within the geographical area covered by the agreement." While the majority makes much of this geographic "limitation," one need only refer to the national agreements which exist among all crafts to discover the ineptness of this language. In the Iron Workers agreement with the National Constructors Association, for example, the geographic scope of the agreement is "all places in the United States where work is being performed or is to be performed by the Employer." (Appendix 1) Such "national agreements" are common among larger union contractors, most of whom are double breasted and are related by common ownership to large open shop firms. The bill would extend those union agreements to the related open shop contractors everywhere in the United States, and to their nonunion employees (who number in the tens of thousands) across the country.

In addition to these "national" agreements, many union contracts are "multi-state" or "regional" in scope. Some, for example, are broader in geographic scope than may be apparent. The agreement of Painters' Local 249 with the Independent Painting, Deco-

rating and Drywall Contractors ostensibly covers a six-country area surrounding Dayton, Ohio (Montgomery, Miami, Preble, Greene, Darke and Clark counties), yet also provides that the union contractors signatory to the agreement must apply the terms of Painters' agreement "when engaged in work outside the (contract's) geographic jurisdiction." (Appendix 2) S. 492 would, therefore, force this agreement not only on all related open shop contractors in the Ohio counties, but also everywhere outside that geographic area—i.e., nationwide—where those related contractors were performing work.

The majority also makes much of what it describes as the "contract-driven" nature of S. 492. It conveniently ignores, however, the fact that a number of union construction contracts contain clauses negotiated by the parties specifically excluding parent and subsidiary operations not signatory to the agreements (e.g., Iron Workers' contract, Appendix 1). By extending the contracts to those non-signatory subsidiary operations, S. 492 is not "contract-driven" but, instead, abrogates the negotiated contractual terms.

The forced application of collective bargaining agreements to non-signatory open shop companies will be accomplished without regard to the desires of the employees. These employees would be subjected to the terms of union contracts, which in many instances would actually deprive them of work with their current employers. While the bill would not remove decertification elections, for which petitioning employees are eligible under current law, this remedy is insufficient. Most construction projects would be completed before a decertification election could be held. Moreover, many employees lack the financial and organizational wherewithal to mount a decertification campaign in the construction industry. And the currently independent, nonunion employees would be swept into a bargaining unit with union employees, making decertification difficult, if not impossible. It is simply unfair to subject these employees to union representation without allowing them a voice in the decision in the first place.

The majority has suggested that to do so is not an injustice since § 8(f) of the National Labor Relations Act already permits pre-hire agreements. Such an argument misses the point. Typically a pre-hire agreement is entered into between the union and employer before the employer hires any employees. Usually it is the union which provides the employees. The employees seek job referrals through the union's hiring hall. In the case of open shop affiliates covered by the bill, the affected workers are already employed by the company—a company which, in any event, has never agreed to the contract. Those workers have chosen to work for that company, rather than to be referred to jobs with other companies through a union hiring hall.

The fatal flaw in this bill, however, is that it substitutes a wooden formula for the current fact-based analysis tailored to examine the relationships between related companies on a case-by-case basis. The bill's formula makes no distinction between "sham" operations (which are already illegal) and the many legitimate dual shop operations which are operated in good faith compliance with the current law. Indeed, the majority acknowledges, without argument, the testimony at the Committee's hearing that dual shops

are a recognized method of doing business. The majority fails even to discuss why these legitimate operations should be restricted.

Passage of this legislation would cause unwarranted disruption in the construction industry. The mandatory application of union contracts to open shop companies will force many of them to go out of business. Conversely, competition from the open shop many require many double breasted contractors to shut down their union operations, where they are able to do so without violating other legal and contractual obligations or without incurring crippling withdrawal liability from multi-employer pension plans. As the majority acknowledges, it is impossible to say how many companies will be forced out of business as a result of this legislation. However, given the large numbers of dual shop operations in the country, it is safe to say that this number will not be insignificant. It will be the employees of these companies who will be forced to pay the price for this needless and senseless legislation.

This bill is fundamentally unfair because it would extend union contracts to companies and workers who never agreed to be bound by any contract, much less to the specific terms of the contracts which this legislation would impose. The bill will require many workers to join unions in order to keep the jobs they already have. While the proponents of S. 492 point out, with technical correctness, that nothing in the language of the bill itself requires an employee to join a union, the proponents ignore the practical impact of the legislation. First, in non-Right-to-Work states, most union contracts contain provisions which require employees to join a union within seven days as a condition of their continued employment. Even in Right-to-Work states, most union contracts contain exclusive hiring hall provisions which require employees to go through a union hiring hall in order to obtain employment with a signatory company. These hiring hall provisions are often worded in a manner which ensures that more senior union members are given priority over newcomers or non-members. Examples of these are the local agreements of the Plumbers and Pipefitters Union and of the International Brotherhood of Electrical Workers found in Appendix 3.

Hiring hall clauses are legal even though their effect and purpose is to place non-members at a disadvantage in job referrals. One would have to turn a blind eye to reality to believe that non-members would be treated equally with union members even absent such clauses. Union business agents are usually elected by union members. The urge to give union members preference is often irresistible. In many cases, therefore, where an open shop company is unionized by virtue of this bill, its employees would go down to the bottom of the hiring hall list. Union members would be referred first. Consequently, the effect of the bill in many instances would be to replace one group of workers with another. In addition, membership and seniority requirements would have a disparate impact on open shop black and women construction workers who are forced to go through a hiring hall. Many of these workers only recently have even been permitted entrance to the construction industry. They will often get no credit for the skills they have or the work they have done. Instead, most will be forced back to the bottom of the ladder, with no chance for recovery.

The bill also will have a disparate impact on minority contractors and their employees. Testimony from Ralph C. Thomas, Executive Director of the National Association of Minority Contractors (NAMC) highlighted this problem. Because of the historical and well-documented pattern of discrimination in the Building and Construction Trades unions, most minority contractors entered the market on an open shop basis. Today, most minority contractors are nonunion subcontractors. Many of these subcontractors do work for the open shop arms of dual shop general contractors. The union arms of these dual shop contractors are parties to contracts which usually require subcontracting only to union subcontractors. Such "union only" subcontracting clauses are contained in most construction union contracts. When, by operation of S.492, these collective bargaining agreements are applied to the open shop operations of these dual shop contractors, the nonunion minority subcontractors will no longer be able to work for them.

The economic impact will be devastating. Not only will many of these contractors be put out of business, but their workers, who are in large part minorities as well, will be unemployed. For example, the NAMC currently implements a Major Corporation Program in which some of the country's largest and most respected dual shop construction firms participate with NAMC in increasing contracting opportunities for minority contractors. Just one of these companies, Turner Construction Company of New York, awarded more than \$100 million in subcontracts to minority businesses in 1986. Turner Construction is a dual shop company. If it were forced to go totally union, it would no longer be able to provide such opportunities to minority subcontractors, because of the "union only" subcontracting clause in their collective bargaining agreements. Thus, the company, its employees and their families would suffer. (See e.g., NAMC letter addressed to Rep. William L. Clay, dated April 6, 1987, and letter to Congress dated October 13, 1986, Appendix 4.)

The majority also have expressed concern over the effect of this bill on minority contractors. Some members have even suggested that they would accept amendments to the bill which would prohibit discrimination under its terms. Such suggestions miss the point. Minority contractors are among those who directly benefit from the practice of double breasting. The elimination of double breasting would in and of itself deprive them of an important source of work. Those minority contractors which depend on dual shop general contractors for their existence will be forced out of business. We see no way in which this bill could be amended to protect them from this calamity.

The bill would further tend to destabilize labor relations by permitting expanded picketing. The majority is at pains to demonstrate that with the changes made by the Kennedy substitute amendment, the bill no longer authorizes "common situs" picketing, in the strict definition of the term, because of the new general contractor-subcontractor proviso. This begs the question. In fact, the bill would expand picketing. Currently, an employer, its employees and customers are protected from secondary boycotts and picketing by the employees of another company. By sweeping separate but related companies under the rubric "single employer," this legislation would subject these companies to picketing in dis-

putes in which they are not parties. Once two or more companies are defined as a "single employer" for labor law purposes, they lose their secondary boycott protections and may be picketed as a "single employer" anywhere any of the entities is doing business. Thus, work on a job site could be closed down because of a dispute a union might have with another separate but related company. This is injurious not only to the company performing the construction but to the owner of the site, and to the community which would receive the direct and indirect benefits from the new construction. Under this bill a union may picket a related company even if that company has no control over the other company's labor relations policies. This is the very evil which the prohibitions against secondary boycotts in the National Labor Relations Act were enacted to prevent.

The bill is also anti-competitive. Mr. Richard Heckert, Chairman and Chief Executive Officer of E. I. du Pont de Nemours and Company, Inc., testifying on behalf of the Business Roundtable, the U.S. Chamber of Commerce, and the National Association of Manufacturers, expressed his grave concern on this point. The pressure from overseas competition in the 1970's forced United States manufacturers to reassess their construction costs. Construction work which was formerly all-union was awarded by project owners on a merit shop basis. Open shop companies and double breasted companies were able to compete for this work. Construction costs have been lowered, not necessarily by lower wages, but by application of less restrictive work rules and elimination of other non-productive work practices. This has helped to offset foreign wage differentials, enabling American manufacturers to build more plants in this country. The result has been more construction and more jobs in this country.

In the words of Mr. Heckert, "Now [S.492] proposes to break what the free market has fixed." Not a single new job would be created by this bill. In fact, the opposite would be the case. If dual shop contractors are forced by this legislation to shut down either their union or their open shop operation, fewer construction companies will be available to bid on the required work. Fewer companies in the field inevitably will result in higher construction costs. Since construction costs are a major component in the final product cost of most manufacturers, this legislation will help to diminish that competitive edge which American industry is trying so hard to achieve in a global market.

It is perhaps in tacit acknowledgment of the weakness of this bill that the majority has relegated its discussion of the so-called "dual shop" provisions of the bill to a handful of pages toward the end of the report. We find this significant because clearly these provisions are the central feature of the bill. The majority does not even attempt to address the impact of the bill on the construction industry, its employees and its customers. The majority does not attempt to refute the central arguments against the bill. We can only conclude that the reason is that they cannot be refuted.

Pre-Hire Agreements

Sec. 2(c) of the bill would alter the nature of pre-hire agreements in the construction industry. One of the basic tenets of the Nation-

al Labor Relations Act is that the decision as to whether or not a group of employees is to be represented by a union, and if so, which union, rests with a majority of the employees in an appropriate bargaining unit. Because of the unique nature of the construction industry, with its transitory work force and the relatively short duration of many projects, union election and certification procedures based on majority support often do not lend themselves well to the construction environment. Recognizing this, Congress in 1959 added § 8(f) to the National Labor Relations Act, permitting so-called "pre-hire" agreements in the construction industry. Under § 8(f), it is not an unfair labor practice for an employer and a union to sign a collective bargaining agreement even if the union does not represent a majority of the employees involved—in fact, such an agreement can be signed even if the employer has no employees at the time the agreement was entered into.

We do not argue against § 8(f) of the Act. Rather, our argument is with the bill's dramatic expansion of § 8(f). In fact, the National Labor Relations Board and the courts have always maintained a distinction between § 8(f) pre-hire agreements and collective bargaining agreements entered into between employers and majority unions pursuant to § 9 of the National Labor Relations Act. The reason for this distinction is obvious. A union which enters into a § 8(f) pre-hire agreement usually does not have the support of a majority of the employees—as pointed out above, often there are no employees at the time the agreement is signed. A union with § 9(a) status is, however, much different. There, the union has been designated as the representative of the employees by a majority of the employees themselves, rather than by the employer and the union. The law presumes that the union continues to have this majority support until proven otherwise and, therefore, mandates an ongoing relationship even after the expiration of a particular collective bargaining agreement. Majority unions may also strike and picket to obtain initial or subsequent collective bargaining agreements. Because a union need not have majority support to enter into a pre-hire agreement, there is no such presumption under a § 8(f) agreement, and either the employer or the union may terminate the relationship upon the expiration of the agreement.

When similar legislation to S. 492 was introduced in the 99th Congress, its proponents argued that the law as it was then interpreted by the National Labor Relations Board and the courts permitted employers to unilaterally repudiate pre-hire agreements in mid-term. They claimed that employers simply could "walk away" from a pre-hire agreement during its term. Whatever the merits of that argument, it is moot. In February 1987, the National Labor Relations board issued its decision in *John Deklewa & Sons*, 282 NLRB No. 184 (1987), expressly holding that § 8 pre-hire agreements may not be unilaterally terminated prior to their expiration and are enforceable for their entire term. Upon expiration, either party is free to terminate the relationship.

It would appear to us that the *Deklewa* decision has resolved the proponents' concern about an employer's ability to void a pre-hire agreement prior to its termination. However, the bill goes beyond this stated concern. It would afford § 8(f) pre-hire agreements the same status as § 9 collective bargaining agreements. Thus, it would

confer on construction unions which have not been selected by a majority of the affected employees the same status as those unions which have been selected by a majority of employees. Contrary to the contentions of the majority, this clearly is not what Congress intended in 1959.

The majority has gone to great lengths to construct an argument from the legislative history of the Landrum-Griffin Act that Congress intended that unions that signed pre-hire agreements were to be afforded §9(a) status. Significantly, despite the fact that almost 30 years have passed since the LMRDA was enacted, the majority has failed to cite a single decision of either the NLRB or the courts which supports their position. The reason is because the majority's position is not supported by the legislative history.

For example, the majority concedes that S. 492 would permit a union, upon expiration of a pre-hire agreement, to use "economic pressure" (i.e., strike or picket) to compel an employer to continue to recognize the union and to enter into new agreements. Yet, the legislative history of § 8(f) demonstrates that pre-hire agreements were intended to be entirely voluntary. The House Conference Report on the LMRDA states:

The conference adopted the provision of the Senate bill premitting prehire agreements in the building and construction industry. [Section 705] Nothing in such provision is intended to . . . authorize the use of force, coercion, strikes, or picketing to compel any person to enter into such prehire agreements.

Legislative History of the Labor-Management Management Reporting and Disclosure Act of 1959, Volume 1 at 946 (1959).

In addition, during the floor debate Congressman Graham Barden, the floor manager for the Conference Report, cited as controlling the following colloquy between Senators John F. Kennedy and Holland concerning the precursor of Section 705 of the LMRDA:

Mr. HOLLAND. Was it the intention of the committee that Section 604(a) shall require employers to enter into pre-hire agreements where the union has not been the recognized or certified agent of the employees involved?

Mr. KENNEDY. I shall answer the Senator from Florida as follows—and it is my intention, by so answering, to establish the legislative history on this question: It was not the intention of the committee to require by Section 604(a) the making of pre-hire agreements, but, rather to permit them; nor was it the intention of the committee to authorize a labor organization to strike, picket, or otherwise coerce an employer to sign a pre-hire agreement where the majority status of the union had not been established. The purpose of this section is to permit voluntary pre-hire agreements. This is because of the inability to conduct representation elections in the construction industry.

Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Volume 2 at 1715 (1959).

Thus, it is clear that pre-hire agreements in the construction industry are and have always been intended to be voluntary relationships permitted by Congress since 1959. This bill would alter the voluntary nature of these agreements by providing that, once an employer signs such an agreement, he is involuntarily bound to the union after the agreement's expiration, no matter what his experience under the agreement. Since an employer is required to continue to recognize and to bargain with a § 9 majority union after the expiration of the contract, by giving § 8(f) pre-hire agreements the same status the terms of S. 492 would force employers into collective bargaining relationships with non-majority unions beyond the period for which they expressly bargained in the contract. Despite the fact that an employer had a very unsatisfactory experience with a union, under this bill it would be required to continue to deal with the union even if the union did not enjoy the support of a majority of the affected employees. The employer would be required to abide by the terms and conditions of the contract even after it expired. It could be required to extend those conditions to new projects. The union would be the representative of the employees on projects which did not even exist at the time of the expiration of the contract. This would be so although there was no evidence that the employees or the employer wanted to have anything to do with the union. The union could also strike and picket for a subsequent pre-hire agreement. This is hardly the "voluntary" relationship which Congress envisioned in 1959.

The specific complaint of the proponents which this legislation purportedly sought to address is already more than adequately addressed by the *Deklewa* decision. First, a minority union's collective bargaining agreement cannot be repudiated during its term. Employers may no longer simply "walk away" from a pre-hire agreement during its term. Second, if a union establishes majority support either through an election or through recognition by the employer of its majority status, the employer is required to continue to bargain with the union after the expiration of an agreement. This is now the law under *Deklewa*.

D. Summary

In sum, the legislation is both unnecessary and unfair. It is unnecessary, since the creation of shell corporations in an effort to avoid collective bargaining agreements or to "funnel" work to open shop subsidiaries is already illegal. Under the law, it is already illegal to terminate a pre-hire agreement prior to its expiration. The bill is unfair, because it makes no distinction between those few operations where shell corporations may exist and the many legitimate dual shop concerns which currently operate in good faith reliance on existing law. It is unfair, because it would force union contracts upon non-signatory employers who never agreed to be bound and upon nonunion employees without their consent. It is unfair, because it would force many employees to go through union hiring halls, and in many cases to join unions in order to retain the jobs which they already have. It is unfair, because it would have an adverse impact on minority contractors and on black and women non-union construction workers. It is unfair, because of the negative impact on the entire construction industry which would force many

construction companies to close their doors. And, it is unfair to construction customers, and ultimately the public, since it is they who would ultimately bear the increased costs of construction which this bill would cause.

It is our understanding that the full Senate may well have an opportunity to work on this ill-conceived and misrepresented legislation. We hope that when our colleagues are afforded an opportunity to understand the actual meaning and effect of S. 492, they will join us in opposition and vote to protect the rights of all Americans to choose who their bargaining representative will be. Surely, we can have effective labor laws without having to disenfranchise American workers.

ORRIN HATCH.

DAN QUAYLE.

STROM THURMOND.

THAD COCHRAN.

ROBERT T. STAFFORD.

GORDON J. HUMPHREY.

MINORITY VIEWS OF MESSRS. QUAYLE AND HATCH

Supporters of S. 492 have told me that this bill is needed to prevent contractors from evading collective bargaining agreements through the practice of "double-breasting". The evasion of a collective bargaining agreement by setting up a "sham" operation to siphon away work is deplorable. It also is prohibited under present law.

Despite this argument of the proponents, the true purpose of the bill is not to stop evasion of collective bargaining. Current contractual provisions of collective bargaining agreements are enforceable through the National Labor Relations Board, through arbitration, and through actions filed directly in Federal district courts. As has been established by the courts, double-breasting is not an evasion of collective bargaining. It is a response—entirely legal and legitimate—to a collective bargaining relationship. A company is permitted to own separate union and non-union companies or subsidiaries so long as the two are managed and operated separately, or not maintained to evade existing collective bargaining obligations. It is well-established under the labor laws which have existed for nearly 30 years, that employers in construction and other industries may not set up "sham" or "alter ego" mirror corporations to evade a collective bargaining agreement.

In addition, the construction unions are expert in getting anti-double-breasting clauses included in collective bargaining agreements. The statement of attorney Kathy L. Krieger¹ of the United Brotherhood of Carpenters and Joiners before the American Bar Association's Committee on Development of the Law Under the National Labor Relations Act boasted at the ABA's mid-winter meeting in March 1986 that:

As of 1985 the status quo in the construction industry was that more than 7,000 employers and over 50,000 employees, represented by several hundred Locals and internationals, were governed by collective bargaining agreements * * *

S. 492 would establish a Federal mandate to supplant what is currently available—and obtained—through free collective bargaining, and enforced through the NLRB and the courts. The effect of the legislation will be, not to prevent evasion of a collective bargaining agreement, but to reinterpret and impose binding union contracts on open shop construction firms which have neither negotiated the terms nor agreed to be bound by such contracts. It would

¹ Krieger, Kathy L., United Brotherhood of Carpenters and Joiners of America "Developments in Work Preservation" American Bar Association, Committee on Development of the Law Under the National Labor Relations Act, Mid-Winter Meeting March 1986, p. Q10. A footnote to this statement clarifies that this information is based on an informal survey conducted in May 1985, and reflects data for only 5 affiliates of the Building and Construction Trades.

impose union contracts on construction workers who have not had an opportunity to indicate whether they support a union. Such a law violates a fundamental principle of contract law that for a contract to be binding the parties must have agreed to be bound. If S. 492 were enacted, it also would violate the fundamental principle of labor relations law of employee freedom of choice.

Further, S. 492 will upset the delicate balance of contractor, employee and union rights which has been established in the construction industry, an industry characterized by intermittent and itinerant work patterns and one that is extremely sensitive to changes in the economy.

This bill would also have another, perhaps unintended side effect. Howard Jenkins, former four-term member of the National Labor Relations Board, testified on behalf of the National Association of Minority Contractors. Mr. Jenkins, and the National Association of Minority Contractors strongly oppose this bill because they believe its effect would be to "eliminate minority contractors from the construction industry." In his prepared statement, Mr. Jenkins said:

At a very early time the unions in the building and construction trades sought to maintain both a closed union and closed shop job opportunities. The contractors in the union sector of the industry cooperated in that effort because they were enabled to control the construction work that was being accomplished. Since the union sector of the industry dominated the commercial construction field, and the nonunion sector of the industry was limited largely to home building and small construction, there was very little competition between the two. Minority contractors were totally excluded from the competition and certainly from the union sector.

In addition, it should be remembered that union membership in the building trades was highly restrictive. Blacks and other minorities were systematically excluded from job membership in the craft unions * * *.²

Mr. Jenkins' history lesson reminds us that some of the unions which are proposing this change have had a history of closed unions, restrictive admissions practices and discriminatory hiring halls. The effect has been to limit job opportunities for blacks, and also women and other groups not ordinarily represented in construction. For black and minority contractors, access to the building and construction industry, certainly to the sector controlled by the unions, was nearly impossible.

As a result, blacks have tended to be open shop contractors. Their work comes from two sources. First, through general contractors who maintain some open shop portions of their business and are willing to grant subcontracting grants to minority contractors and second, minority contractors get work through contractors who participate in the National Association of Minority Contractors'

² S. Hrg. 100-220, Construction Industry Labor Law Amendments of 1987, Hearings on S. 492 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 100th Congress, 1st Sess. 150 (Statement of Howard Jenkins).

Major Corporation program, a program designed to help bring minority contractors into greater participation in the construction industry.

If those prime contractors were required to limit their subcontracts to the union sector only, many fledgling minority contractors—and their workers—would simply disappear because they would not be able to compete in the marketplace if they were required to work under a restrictive union environment.

In the Executive Session to consider this bill, I offered an amendment to remedy part of this particular problem. The amendment provided that no labor organization that had been found, by a competent authority, to have operated a discriminatory hiring hall or referral service in violation of Title VII of the Civil Rights Act of 1964 as amended, shall become the exclusive bargaining representative of employees not previously subject to its representation, until the same authority found that the discriminatory practices had been remedied. The amendment applied similarly to the extension of a collective bargaining agreement negotiated by a labor organization that operated such a discriminatory hiring hall or referral service, until such authority determined that such hiring hall or referral service was no longer in violation of the law. Though my amendment helped non-union minority workers directly, it would also give temporary relief to non-union and minority construction firms trying to deal with discriminatory hiring halls.

This legislation will have an adverse impact on minority contractors and workers. The bill must be amended to recognize and deal with this problem. However, a majority of members in the Labor and Human Resources Committee rejected such an amendment. As this bill is at the top of the agenda of the construction labor unions, its sponsors have made strenuous efforts to blunt criticisms of the National Association of Minority Contractors, myself and others, that S. 492 will hurt minority contractors by expanding existing collective bargaining agreements to workers and businesses never intended to be covered by them. To prohibit dual shops will hurt minority contractors significantly, but to refuse to delay extending of collective bargaining agreement coverage of a labor organization which has been found to operate a discriminatory hiring hall to workers who may thus be excluded from the labor market is unconscionable. The language of S. 492 still needs to be changed to remedy this problem before it becomes law.

There is a second problem in this bill, and it is as serious in nature as the one mentioned above. Because S. 492 would require the automatic application of the union arm's collective bargaining agreement to the nonunion arm, a great number of non-union construction workers would be unionized involuntarily. Since these agreements usually have an exclusive hiring hall provision, in order to get back their jobs, those workers will have to go through the union hiring hall. Under a typical collective bargaining agreement, in order for a worker to be referred from the hiring hall on the "A", or highest priority list, he or she must: (1) have 4 years' experience in his trade; (2) be a resident of a certain geographical area; (3) have passed a standard examination for the branch of the trade given by the union; and (4) have worked for at least 2 years under this collective bargaining agreement.

If S. 492 were to extend these contracts to non-union employees, even if a non-union worker had 10 years of experience in his trade, he would not be referred for work until (1) he had been given and passed the Union-administered test; and (2) there were no union workers left in this trade who had not been referred for jobs. Thus, previously non-union workers despite their qualifications, could be excluded from working because they will not necessarily have passed the Union test, worked for the requisite period of time under that collective bargaining agreement or reside in the certain geographic area covered by the collective bargaining agreement. This is unfair.

I proposed a second amendment in the Executive Session on S. 492 which would assure that workers of previously non-unionized firms would receive full credit for past service and experience. At the time the amendment was offered, the Subcommittee Chairman asked me to withdraw my amendment so that staff could meet and reach a compromise on the issue of fair and equitable treatment of workers of non-union firms. I agreed to withdraw the amendment.

There are many other problems in S. 492, on which, in the interest of time, I did not offer amendments. One serious problem will be the impact involuntary unionization will have in multi-employer pension plans. Construction work is necessarily intermittent and itinerant. Contractors move around. Workers tend to move from contractor to contractor depending on the work. Unionized construction contractors often contribute to multi-employer pension plans. The decision to do this is taken lightly by no one I know of since the liability payments imposed for withdrawal from a multi-employer plan under the Multi-employer Pension Plan Amendments Act of 1980 are so severe that they provide a potent disincentive to any unionized employer from going non-union. Even a shrinking workforce can trigger withdrawal liability in an amount greater than the contractor's net worth.

There are liabilities for workers too. First of all, open shop employees unionized by this bill would be required to participate in the union's pension plan. Thus, unless they have vested in their open shop employer's pension plan prior to application of the collective bargaining agreement, they will lose any benefits gained. Further, given the way that many union pension plans are structured, if they ever performed open shop work again they will forfeit the benefits earned under the union's pension plan.

Current law allows workers to choose to be union or non-union. S. 492 compels coverage of non-union double-breasted firms. Further, it will compel those firms to become signatories to multi-employer pension plans and cause tremendous difficulties in coverage for previously non-unionized workers who may become covered.

The construction industry is extremely sensitive to the economy and to the demands of the sovereign consumer. The thinly veiled effort by the Building and Construction Trades Union to mandate union membership when they have been unable to convince workers to become unionized voluntarily will result in turmoil and instability to labor relations in the construction industry.

DAN QUAYLE.
ORRIN HATCH.

XIII. CHANGES IN EXISTING LAW

In compliance with rule XXVI paragraph 12 of the Standing Rules of the Senate, the following provides a print of the statute or the part or section thereof to be amended or replaced (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

NATIONAL LABOR RELATIONS ACT

(29 U.S.C. 151-169)

* * * * *

§ 152. Definitions

When used in this subchapter—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof or any person subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. *Any two or more business entities engaged primarily in the building and construction industry, performing work within the geographical area covered by a collective bargaining agreement to which any of the entities is a party, performing the type of work described in such agreement, and having, directly or indirectly—*

(1) substantial common ownership;

(2) substantial common management; or

(3) substantial common control;

shall be deemed a single employer: Provided, That the term and provisions of a contractor-subcontractor relationship between any two or more business entities working at a construction site shall not be deemed to create a single employer or be considered as evidence of direct or indirect common management or control, within the meaning of this sentence.

* * * * *

§ 158. Unfair labor practices

(a)-(c) * * *

(d) **OBLIGATION TO BARGAIN COLLECTIVELY.**—For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wage hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question aris-

ing thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later;

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of

the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

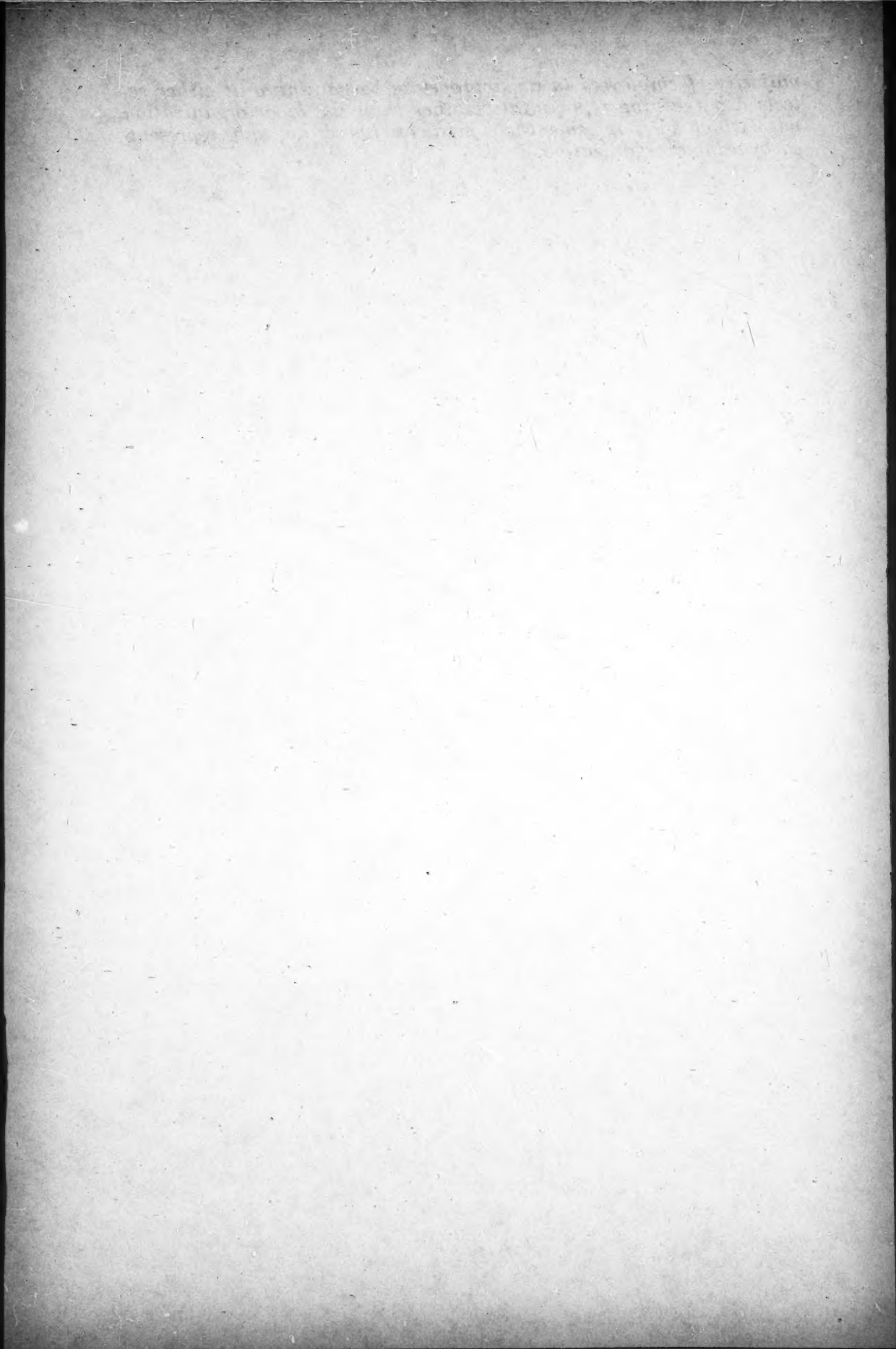
Whenever the collective bargaining involves employees of a business entity comprising part of a single employer in the building and construction industry, as defined in section 2(2) of this Act, the duty to bargain collectively, for the purposes of this section, shall include the duty to apply the terms of a collective bargaining agreement between such business entity and a labor organization to all other business entities comprising the single employer and performing the work described in the collective bargaining agreement within the geographical area covered by the agreement.

* * * * *

(f) AGREEMENT COVERING EMPLOYEES IN THE BUILDING AND CONSTRUCTION INDUSTRY.—It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area[:]. *An agreement lawfully made pursuant to this subsection shall impose the same obligations under this Act as an agreement made with a majority representative pursuant to section 9(a): Provided, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section; Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title: Provided further, That any agreement lawfully made pursuant to this subsection may be repudiated only after the Board certifies the results of an election conducted pursuant to section 9(c), in which a*

majority of employees in an appropriate bargaining unit either selects a bargaining representative other than the labor organization with which such agreement was made or chooses not to be represented by a labor organization.

* * * * *



APPENDIX 1

NATIONAL AGREEMENT

This agreement entered into the 13th day of March 1979, by and between the International Association of Bridge, Structural, and Ornamental Iron Workers (hereinafter referred to as the "Association") and the National Constructors Association on behalf of the members signatory hereto who are hereinafter called the "Employer".

ARTICLE 1

This Agreement shall remain in full force and effect for a period of one year from the above date and shall continue from year to year thereafter unless notice of termination is given in writing by either party to the other party at least sixty (60) days, but not more than ninety (90) days prior to any anniversary date.

ARTICLE 2

Scope

This Agreement shall be effective in all places in the United States where work is being performed or is to be performed by the Employer—or by any person, firm or corporation owned or financially controlled by the Employer, except for work performed under multi-trade project agreements covering individual jobs or specific geographical regions which contain provisions making those agreements applicable. This Agreement covers all field erection and construction work traditionally performed by and coming under the jurisdiction of the Association, as recognized by the trade agreements of the Building and Construction Trades Department, AFL-CIO under the Plan for Settlement of Jurisdictional Disputes in the Construction Industry dated June 1, 1975. The Employer recognizes that the claimed scope of work covered under this Agreement by the Association is that provided for but not limited to the jurisdictional claims contained within the charter grant issued by the AFL to the Association and contained in Article 4 of the Association's Constitution as amended August 23-27, 1976. The Employer agrees to consider without being bound those claims when issuing jurisdictional assignments and such claims shall constitute a part of this Agreement with the same force and effect as though fully set forth at length herein. Furthermore it is understood by the parties that those claims are subject to jurisdictional procedures set forth in Article 21 of this Agreement.

ARTICLE 3

Recognition

The Employer recognizes the Association as the sole and exclusive bargaining representative for all employees employed on all field erection and construction work coming under the jurisdiction of the Association.

Fabrication work covered by this Agreement performed in the individual Employer's warehouse, shop, or yard, that has been established exclusively for a specific job, shall be subject to the terms and conditions of this Agreement.

ARTICLE 4

Union Security

All field construction employees covered by this Agreement, as a condition of their continued employment, commencing on the eighth day following the beginning of their employment or the effective date of this Agreement, whichever is the later, may be required to obtain and maintain membership in the Association. Failure of an employee to comply with the provision of this Article shall, upon written request of the appropriate local union representative of the Association, result in the termination of such employee. The Employer shall not justify any discrimination against an employee for non-membership in the Association if: (A) He has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members; or (B) He has reasonable grounds for believing that membership.

LETTER OF INTENT I—IW-NCA NATIONAL AGREEMENT

The purpose of this letter is to state the intent of the joint IW-NCA Negotiating Committees as it applies to the interpretation and application of Article 2: Scope of the IW-NCA National Agreement.

Article 2: Scope reads in part:

"This Agreement shall be effective in all places in the United States where work is being performed or is to be performed by the Employer—or by any person, firm or corporation owned or financially controlled by the Employer
* * *

It is understood that this language requires all contractors signatory to this Agreement, as well as any subsidiary or corporation financially controlled by that signatory contractor, to comply with all the terms and conditions of this National Agreement. However, the language of this Article and the terms of the Agreement do not run laterally or upward to parent, affiliates, other divisions or their subsidiaries and shall only apply individually after signature of such parent, affiliate, division or their subsidiaries.

JOHN H. LYONS,

Iron Worker Negotiating Chairman.

RICHARD G. BODNER,

NCA Negotiating Chairman.

APPENDIX 2

WORKING RULES AND AGREEMENT BETWEEN THE BROTHERHOOD OF PAINTERS AND ALLIED TRADES OF AMERICA LOCAL UNION No. 249, A.F. OF L.-C.I.O. AND THE INDEPENDENT PAINTING, DECORATING AND DRYWALL CONTRACTORS

JURISDICTION

Montgomery County, Miami County, Preble County, Greene County, Darke County and Clark County.

Article I

This Agreement, made an entered into by and between the Brotherhood of Painters and Allied Trades of America, Painters Local Union No. 249, A.F.L.-C.I.O., and the Employers Negotiating Committee, representing painters, wall coverers, drywall finishers and allied trades and each employer who is a separate signatory to this Agreement or works under the provisions of this Agreement in the jurisdiction stated above, this 14th day of May, 1986 through April 30, 1989.

UNION SECURITY

It is agreed that all workmen covered hereby shall become members, or shall make application for membership, not later than the 8th day following the beginning of employment, or the effective date of this Agreement, whichever is later, and shall thereafter remain continuously in good standing in the Union as a condition of employment. For the purpose of establishing the 8th day, the Employer agrees to notify the Union in writing within 24 hours after employment of any workman, and to discharge any employee not in good standing with the Union, within 48 hours from receipt of official written notification.

The contractor or employer party to this agreement, when engaged in work outside the geographical jurisdiction of the Union party to this Agreement, shall employ not less than 75% of the men employed on such work from among the residents of the area where the work is performed or from among persons who are employed the greater percentage of their time in such are. Any others shall be employed only from the contractor's home area.

The employer, party hereto, shall, when engaged in work outside the geographic jurisdiction of the Union party to the agreement, comply with all of the lawful clauses of the collective bargaining agreement in effect in said other geographic jurisdiction and executed by the Employers of the industry and the local unions in that jurisdiction, including, but not limited to, the provisions of the

wages, hours, working conditions, and all fringe benefits therein provided, provided however, that as to employees employed by such employer from within the geographic jurisdiction of the Union party to this agreement and who are brought into an outside jurisdiction, such employee shall be entitled to receive the wages and conditions effective in either the home or outside jurisdiction, whichever are more favorable to such employees.

The employer, party hereto, shall not attempt to engage in any work covered by the agreement in this area or in any area outside of the geographic jurisdiction of the union party thereto through the use or device of another business or corporation which such employer controls or through the use or device of a joint venture with another employer or contractor in an outside area without first consulting with the Brotherhood for the purpose of establishing to the Brotherhood's satisfaction that the use of such device is not for the purpose of taking advantage of lower wages or conditions than are in effect in the home area of such employer, and if the Brotherhood is not so satisfied, the Union party has the option of cancelling the Agreement.

APPENDIX 3

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, OWENSBORO, KY

Section 1. The Union shall be the sole and exclusive source of referral of applicants for employment. The contractor shall submit requests of specified numbers of individuals for employment not less than 48 hours (excluding Saturdays, Sundays, and recognized holidays) before the time the contractor wishes them to report for work. The contractor at that time shall indicate any special qualifications of the individuals, the location of the job, and the reporting date and time.

Section 2. The Union shall then refer individuals for employment with the requesting contractor on a non-discriminatory basis, giving priority to the following categories in individuals in the following order:

(a) Individuals who have worked four or more years under the Working Agreement between the Plumbing and Heating Contractors of Owensboro, Kentucky, and all countries within the jurisdiction of Local 633, as journeymen plumbers or pipefitters.

(b) Individuals who have worked two or three years under the Working Agreement between the Plumbing and Heating Contractors of Owensboro, Kentucky, and all countries within the jurisdiction of Local 633 and Local Union No. 633, as journeymen plumbers or pipefitters.

(c) Individuals who have been employed as journeymen plumbers or pipefitters under the collective bargaining agreement of a sister local union of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, of the United States and Canada, AFL-CIO, or who have worked under the Working Agreement between the Plumbing and Heating Contractors of Owensboro, Kentucky, and all counties within the jurisdiction of Local Union No. 633, but have done so less than 2 years.

(d) All other applicants.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, EAST CENTRAL CALIFORNIA

Article III

Hiring Clause—Referral Procedure

3.1.1. The Union shall be the sole and exclusive source of referral of applicants for employment.

3.1.4. The Union shall maintain a register of applicants for employment established on the basis of the groups listed below. Each applicant for employment shall be registered in the highest priority group for which he qualifies.

Group I. All applicants for employment who have four (4) or more years' experience in that branch of the Electrical Construction Trade in which they are seeking employment with the classifications listed herein; are residents of the geographical area constituting the normal construction market of Fresno, Madera, Kings and Tulare Counties of California; have passed a standard examination of that branch of the trade given by a duly constituted Local Union of the I.B.E.W. and who have been employed for a period of at least two (2) years in the last four (4) years under the Collective Bargaining Agreement between the parties to the Agreement.

Group II. All applicants for employment who have four (4) or more years of experience in that branch of the Electrical Construction Trade in which they are seeking employment with classifications listed herein; are residents of the area consisting of Kern, Stanislaus, Tuolumne, Merced, Mariposa, San Benito, Santa Clara and San Luis Obispo Counties of California; have passed a Journeyman examination of one of the branches of the Electrical Construction Trade given by a duly constituted Local Union of the I.B.E.W.

Group III. All applicants for employment who have four (4) or more years' experience in that branch of the Electrical Construction Trade in which they are seeking employment with classifications listed herein; and have passed a standard Journeyman examination of that branch of the trade given by a duly constituted Local Union of the I.B.E.W.

Group IV. All applicants for employment who have two (2) or more years experience in that branch of the Electrical Industry in which they are seeking employment, are residents of the geographical area constituting the normal construction labor market of Fresno, Madera, Kings and Tulare Counties of California.

Group V. All applicants for employment who have worked in the Electrical Construction industry for more than one (1) year.

APPENDIX 4

NATIONAL ASSOCIATION OF MINORITY CONTRACTORS,
Washington, DC, April 6, 1987.

Re: H.R. 281

Hon. WILLIAM L. CLAY,
*Chairman, House Subcommittee on Labor Management Relations,
Rayburn House Office Building, Washington, DC.*

DEAR CONGRESSMAN CLAY: For years you have been a loyal friend and supporter of the minority business community. As a Congressman, you have endorsed a number of programs and legislation that have assisted in the development and growth of minority business enterprises. Please know that National Association of Minority Contractors (NAMC) is very appreciative of your fine accomplishments in such area. Nevertheless, NAMC has concluded, after much study, that, if enacted, your proposed bill, H.R. 281, even with its substitute amendment, would impose serious economic hardship on many minority-owned construction firms.

It should be understood that most of the estimated 60,000 minority contractors in America are non-union subcontractors. The reason for this phenomena is that, due to being locked out of the construction industry for more than a century after the civil war, such contractors are still in their developmental stages. Thus, they simply cannot, at this point in history, afford to pay the wages and benefits most construction trade unions presently demand. Obviously, all of the subcontracting opportunities can only come from open shop prime contractors.

NAMC currently implements a Major Corporation Program (MCP) in which some of the country's largest and most respected construction firms participate with NAMC in increasing contracting opportunities for minority contractors. Just one of these companies, Turner Construction Company of New York, awarded more than \$100 million to minority businesses in subcontracts in 1986. Turner Construction is a dual shop company. If it were forced to go totally union, it would no longer be able to provide such opportunities to minority contractors. Thus, the company, its employees and their families would suffer.

We recognize your sincere intention in proposing H.R. 281—namely, to prevent union contractors from creating related, sham non-union operations to which they can siphon work and thereby evade existing collective bargaining obligations. We submit that this noble goal can be accomplished without a blanket elimination of all "double-breasting" in the construction industry.

Therefore, we request that H.R. 281 be modified to show a distinction between double-breasted contractors which are established and operated lawfully, and those which are not. If this were done,

it is very likely that much of the current, heated opposition to this bill would be reduced.

Thank you for your consideration of this request. We look forward to working with you in whatever way we can in the future.

Very truly yours,

RALPH C. THOMAS III,
Executive Director.

NATIONAL ASSOCIATION OF MINORITY CONTRACTORS,
Washington, DC, October 13, 1987.

DEAR SENATOR/CONGRESSMAN: The National Association of Minority Contractors (NAMC) is an education-oriented business trade organization consisting of over 3,500 minority construction firms nationwide. A major function of our organization is to educate national legislators of the impact of federal legislation on minority contractors. Upon reviewing H.R. 281/S. 2181, we find that such legislation will have a detrimental effect on the ability of most minority contractors to procure subcontracting work from prime contractors.

H.R. 281 would outlaw the ability of construction firms to engage in "double-breasting"—a practice which allows such companies to operate both union and non-union entities. Most minority construction firms are non-union and have no access at all to construction projects requiring union workers. Because of the existence of the "double-breasting," however, minority contractors can now take advantage of subcontracting opportunities from large prime contractors which have non-union entities.

Presently, our association has a Major Corporation Program in which some of the largest construction firms in the country participate. Such companies, majority-owned, consist of those businesses which are most sensitive to minority business participation in the construction industry. Because some of these companies are "double-breasted," they have been able to award hundreds of millions of dollars in subcontracting work to minority contractors through their non-union entities. The elimination of this outlet would permanently close the door to a reliable source of work and revenues for minority contractors—not to mention the harmful effect such act would have upon minority workers who are employed by such minority contractors.

Minority unemployment continues to be a national problem, and we must remember that minority businesses, as an entity, is still the Number One employer of minorities. This is an age in which procurement opportunities for minority businesses and employment opportunities for minority workers should be expanded rather than reduced, as the implementation of H.R. 281 would do.

Please consider the above-stated facts when voting on H.R. 281/S. 2181. Your vote will impact upon thousands of minority contractors and hundreds of thousands of minority workers.

Sincerely,

RALPH C. THOMAS III,
Executive Director.